Supreme Court United States.

OCTOBER TERM, 1877.

No. 744 of October Term, 1876.

WILLIAM F. COCHRANE ET AL., Appellants,

vs.

JOSIAH W. DEENER ET AL.

MOTION TO SET ASIDE DECREE.

Abstract of Testimony, and Brief of Counsel for Motion.

Thomas McGill & Co., Printers, Washington, D. C.

Statement of Case.

Abstract of Petition.

1st. Appellees had surrendered to A. H. Herr management of case.

2d. Prior to argument of case in Supreme Court, A. H. Herr entered into agreement with appellees, providing for settlement of case, and for a license for a trivial sum.

3d. Herr and appellees agreed that case was to be argued as though no settlement had been agreed upon.

4th. Herr ceased to have any substantial interest in defense after said settlement.

5th. In consequence of the settlement, the case was not fully presented to the court; that Herr declined to employ the counsel (W. A. Davidge) who had successfully argued case below; that the cause was prosecuted after the time of settlement, with the sole view of expediting a decision.

6th. That appellants prosecuted said suit after the settlement, with a view solely to obtain decision to influence other suits to be brought thereafter.

7. That a mandate was issued from this court, and a decree for injunction and account was entered below, May 15, as if no settlement had taken place, and now stands of record in that court, unsatisfied and unexplained.

8. That said decree has never been enforced in said court, and costs in said court never taxed or assessed, and costs in the Supreme Court were never collected.

9. That bill in equity was filed in United States Circuit Court for District of Minnesota against Christian *et al.*, (May 23, 1876,) sworn to by Rodney Mason, an appellant, charging that decision of this court had the effect of "*res adjudicata*" therein as to validity of Cochrane patent and question of infringement.

[NOTE.—This bill claims $300,000 damage for infringment by a single mill.]

That an injunction was granted in said suit in Minnesota, and its issue suspended only on bonds being given in sum of $250,000.

10 A. That A. L. Merriman, counsel for appellants, stated: That the appellees, or the party or parties controlling the case on their behalf, were not, at the time of said argument, really interested in opposing a decree in favor of said appellants.

10 B. That the said Rodney Mason, one of the appellants aforesaid, in an affidavit filed in the Circuit Court of the United States for the Eastern District of Missouri, set forth that an arrangement was made between one of the counsel for appellants and said Herr, on behalf of appellees, *that "if the case should be submitted* on printed briefs, and decided in favor of complainants, that defendants should not be enjoined," *which was what they principally feared*, and that they might pay an agreed sum of one thousand dollars. (See affidavit annexed to petition, page 13.)

Abstract of Respondent's Answer.

1. Deny knowledge of Herr's relations to appellees, and allege that he was largely interested in the result of said suit; that he was a man of large wealth, &c. (P. 1.)

2. The suit was brought against parties interested in several patents, and that litigation involved right to realize profits by appellees under their patents. (P. 1.)

That a stipulation was entered into in court below, to speed appeal to this court, and to argue case on printed briefs. (P. 2.)

That after decree was rendered in court below, respondents were informed by Herr that appellees had been advised not to adhere to stipulation, except patents were pooled, which proposition respondents declined.

That an agreement was then entered into that

"The respondents, as the price of a compliance by the appellees with their stipulations, consented to fix the sum of $1,000 as the amount which they would claim if they obtained a reversal of the decree in the court below, for past and future use of the machinery in the mills aforesaid by the defendants."

3. "They deny any agreement was made with the appellees,

or any one for them, in relation to the prosecution of said cause to a final hearing, or any other agreement than the one above mentioned."

4. "For the reasons already set forth they deny that, by reason of the understanding aforesaid, the said Herr ceased to have any real interest in defeating a decree in favor of said appellants.

5. "They deny, on information and belief, that said Herr purposely neglected to have the cause of the appellees properly presented to this court, or that it was prosecuted by him with an understanding and expectation that his action in the premises would facilitate the obtaining of a decree in favor of the appellants.

6. "They say that this suit was instituted as a test case, and its principal object was to obtain a decision of this court on the validity of their patents, upon which, if favorable, it was intended to rely, in asserting their rights against all infringers. But knowing that such decision would be of no value, unless made upon a full exhibition of the case, they not only desiring, but by suggestion contributed to the introduction into the case of all the defense of which they had knowledge, in order that they might be disposed of by the final decision."

7. "These respondents did procure the mandate of this court to be issued, and have a decree entered in conformity with it, as they were entitled to do, but they aver that they made no request for a mandate during the term, and this they refrained from doing, because they understood that charges were made by other parties affected by the decision that the case was collusive."

* * * *

8. "They show that since the decree was entered the amount of damages agreed upon as aforesaid has been paid over to the assignee of the complainants, for which reason it was unnecessary to take any account; that the costs have not yet been collected, but that the same have not been released, and are still to be paid."

9. "They admit that several suits have been instituted in the name of the "American Middlings Purifier Company," which is the assignee of the appellants in this cause. It is not claimed in said suits that the decision of this court is *res adjudicata* in the sense of estopping others than parties to this cause, or of excluding defenses, if any there be, which were not known or relied on in this cause; but it is claimed that this decision is binding upon inferior courts, as far as similar

decisions are held to be conclusive upon questions of law in other Federal tribunals in suits against other parties for a like infringement of the same patents.

10 "They deny the truth of the verbal statements attributed to said A. L. Merriman, and of those contained in his letter, of which what is alleged to be a copy is filed, in reference to the conduct of A. H. Herr, and to any collusion between him and respondents.

11 "Having answered fully, these respondents say that they are ready and willing to meet the charge preferred, presenting no technical objections, and only asking that the court shall be satisfied that there is reasonable ground assigned as a basis for the order.

POINTS IN EVIDENCE.

	Page.
A. H. Herr had entire charge of suits for appellees	1
A. H. Herr and his associates did at one time have a nominal co-ownership with appellees as to certain patents called Welch patents, Reynolds & Wheeler patents	1
And issue notice to millers thereunder and commence suits thereunder	5
That only one thousand dollars was collected under said patents by said association; that the association fell through, and said suits were discontinued, by advice of counsel, some time before case of Cochran *v.* Deener was docketed in this court, (October 5, 1876)	10
At the time of the agreement, hereinafter referred to, between Cox & Herr for settlement of case, Herr placed no value on his interest in these patents	10, 11
That Mr. Davidge had argued case below, and urged and insisted on importance and necessity of oral argument in this court	23
Mr. Davidge asked a fee of $1,000, and Herr's associates insisted upon his employment to argue case orally	26
That Herr represented to Cox that his associates, by advice of Davidge, insisted on oral argument by Davidge	23
And at the same time urged Cox to "pool" the patents	23
Cox declined, on ground that it would be collusive	23
Herr then agreed with Cox that he would give note for $500, and $500 cash, in settlement of case, if decided against him. This was agreed upon	24
Herr asked to have this agreement in writing, Cox declined, as Herr understood, because it would "taint case."	23
Herr then dismissed Davidge, and employed Cady, at fee of $250	25
Merriman had a fee of $100	25
Cady said the case required a better fee	37
Herr's interest, at time of settlement, was mainly to protect his ~~losses~~	13
Herr had sole conduct of case at the time, and all the money to pay	17, 30, 31
Herr had no substantial interest in the Welch, Reynolds & Wheeler patents	27, 28
The agreement was kept secret from counsel and parties except R. Welch	28, 29, 30
After decision of this court, case was settled according to the agreement, and written receipt and license given	26
No allusion made to costs in either settlement or in receipt, and Herr says he was never spoken to about them	38
Suit commenced in Minnesota for $300,000, and bond awarded	43
Statement of Mr Cox	45

Authorities.

Hoskins *v.* Lord Berkely, 4 Tenn., 402.
R. I. Elsan ——, 6 Barn. & Cress., 597.
Fletcher *v.* Peck, 6 Cranch, 147.
Lord *v.* Veasie, 8 How., 251.
Cleveland *v.* Chamberlain, 1 Black, 425.
Gardner *v.* Goodyear Dental Vulcanite Company, Opinions S. C., 1872.

Supreme Court of the United States.
October Term, 1877.

No. 744 of October T. 1876.

WILLIAM F. COCHRANE ET AL., APPELLANTS, *Motion to set aside decree.*

vs.

JOSIAH W. DEENER ET AL.

BRIEF OF COUNSEL FOR MOTION.

E. P. WELCH, J. H. WELCH and R. W. WELCH, together with H. P. WELCH and J. A. MALONEY, prior to April 22d, 1874, were the owners of patents for Middlings Purifiers, dated November, 1872, No. 133,509, February 18th, 1873, No. 133,952. February 18th, 1873, No. 135,953 and reissued patent, dated April 1st, 1873, No. 5346.

Upon the 22d of April, 1874, these parties associated with them in the ownership of these patents, Jas. S. Welch (the father of the above mentioned Welch's) and A. H. Herr, (who was a co-partner with the said James S. Welch.) Accordingly, there was assigned by deed (Exhibit C, record p 64), to A. H Herr and James S. Welch by the other parties, three-sixteenths of the interest in said patents, and ~~said J. S. Welch and A. H. Herr to be~~ said deed, provided that,

"Further, by a power of attorney, to be duly ex-

ecuted by the said parties of the first and second parts, (the Welch's and Maloney,) to vest in them, (A. H. Herr and James S. Welch,) the said parties of the third part, the power of full, sole, and exclusive management and control of the introduction and sale of rights to use said machines and to make contracts, and do all things necessary in this behalf, as in their best judgment and discretion may be deemed proper."

Said A. H. Herr and James S. Welch further agreed with the Welch's & Maloney, as follows, as a consideration of the three-sixteenths interest given them :

"And whereas the said parties of the third part, in consideration of the premises, the assignment, and power of attorney above mentioned, have agreed and do hereby agree to undertake the introduction of said machines, and to advance from their own funds and to pay such necessary expenses as may be thereby incurred, and to further bear the expenses of said interference suit, *to be hereinafter incurred* in prosecuting the same before the Patent Office, and if the judgment of that office should be adverse, then until the judgment of the Supreme Court of the District of Columbia shall have been had thereon, it being expressly understood that no obligation shall rest upon the said parties of the third part to bear, pay, or advance any sums necessary in the conduct of said suit beyond said Supreme Court of the District of Columbia, unless and except a sum sufficient to reimburse them for such outlay as they may have already made in the sale of said machines and in the conduct of said litigation shall have been realized from such sales, and unless and except there shall, at such time, be in their hands a sum, in their judgment, sufficient to pay the further expenses of said suit in the Supreme Court of the United States.

And the said parties of the third part further agree

to exert themselves to the utmost of their and each of their endeavors in making sales of said machines, and for the joint benefit and advantage of all in the premises.

And they agree to keep books of account in which shall be made true, just and accurate entries of all sums of money advanced, received, laid out and expended in and about the same, and of any and all things pertaining said business, which said books of account, as well as all correspondence in relation to said business, shall at all times be open to the inspection of the parties hereto and each of them whenever desired."

Afterwards it was deemed prudent by the parties to purchase two prior patents, one granted to Jesse B. Wheeler, dated April 14, 1863, and one to Ranson S. Reynolds, dated June 23, 1863.

This purchase was made by Jas. A. Maloney, for the sum of $2,000, for the parties owning the Welsh patents, and the patents so purchased were re-issued on the 9th of February, 1875, and March, 1875, so assigned that the interest of the several parties in these two re-issues was to be held in the same proportion and manner as the Welch patents were held by the agreement above-named.

The owners of the Welch and Ranson Wheeler and Reynolds' patent then formed an organization to prosecute parties, and collcet royalties. See testimony page 22, testimony of A. H. Herr.

Q. 30. Who had the management of those suits after they were commenced under the Wheeler, Reynolds and Welch patents?

A. We had a formal organization; I forget now the style of that organization.

Q. 31. You mean a corporation, do you?

A. A corporation, yes; there was no legal form entered into; we were never incorporated.

Q. 32. Was it a partnership?

A. No, sir.

Q. 33. I am a little at a loss to understand what kind of an organization it was; was the paper in writing under which you were associated?

A. No, I do not think we ever entered into any kind of writing; we met in Mr. Welch's parlor, and we there agreed to form a company.

Q. 34. Who composed that company?

A. Mr. Welch and his sons.

Q. 35. Name all who composed the company?

A. Mr. James S. Welch and Mr. James S. Welch's sons, Rosia W., Edward P., James H., and Herbert P., who is now dead; I do not know of any others now.

Q. 36. Was Mr. James A. Maloney in this association?

A. It is possible; I am not sure; I think he was.

Q. 37. What was the purpose of this organization?

A. In the course of time we expected to form a corporation, but there was nothing binding—so considered; it was merely a nucleus or point to start from; Mr. James S. Welch was named as president; I want you to understand as to the import of that word "organization;" it was merely a starting point, and it was not considered that any of the parties were particularly bound or legally bound.

Q. 38. What was the contemplated purpose of this organization?

A. They expected to make some money out of it.

Q. 39. How did they expect to make money?

A. We looked upon those patents as controlling patents, and if the case was properly represented to

the millers, we thought they would be willing to pay a reasonable amount.

Q. 40. Did you cause notices to be issued to the millers?

A. I think we sent out circulars.

Q. 41. Do you remember using the firm "National Middlings Purifier Company" in connection with those notices?

A. I am not sure as to the exact phraseology; I have a memorandum at home.

Q. 49. Have you one of the circulars?

A. Not here.

Mr. HARDING. Please produce one of the circulars to-morrow.

A. H. Herr produces at page 70 of testimony, the following circular, as issued by this organization:

EXHIBIT E.

JAS. S. WELCH, President. E. P. WELCH, Vice-President.
A. H. HERR, Treasurer. J. A. MALONEY, Secretary.

OFFICE OF THE NATIONAL MIDDLINGS PURIFYING CO.
WASHINGTON, D. C., *April* 15, 1875.

To all whom it may concern:

In the year 1871, millers throughout the country were surprised at brands of flour bearing the names of "Snow Drop" and "Washburn" making their appearance upon the New York and Boston markets, and then readily bringing prices ranging from $2.50 to $4.00 more per barrel than other brands of family flour.

The secret of its manufacture soon leaked out by means of a circular issued by Messrs. G. H. Christian & Co., proprietors of the Washburn Flouring Mill, of Minneapolis, Minn., and dated May 31, 1872, in which they offered to sell the information, or rather description, of the construction of the machine, which was patented in France by a Monsieur Perrigault,

and was supposed by Mr. Christian to be public property in this country, hence the offer to give the information for fifty dollars. The principle of the Perrigault machine, however, had been anticipated and patented in this country in 1863, as we will hereinafter show.

Since 1871 there have been patents granted upon 130 improvements upon the original broad principle of the invention. The patent before referred to was granted to Jesse B. Wheeler, April 14, 1863, and reissued to us as the assignees of said Wheeler, February 23, 1875, No. 6307.

This patent covers all machines using the following elements in their construction: A rectangular air tight case, suction-fan, perforated diaphragm or screen, and feed-regulator to feed the material on to said screen evenly and of a uniform depth, means for agitating and moving the material in one direction, while the air drawn up by the fan passes in another direction, and hopper placed beneath said screen with openings for the admission of air.

Then, again, a machine has been extensively introduced into mills by E. N. Lacroix, C. E. Whitmore & Co., and others, having for their element of construction an air-tight case, a movable horizontal screen, an exhaust or suction fan, a blower-fan, and auxiliary air-pipes to convey the air generated by the blower-fan directly under the screen, to lighten up the dust and deleterious matter from the material, and keep the perforation of the screen open.

All machines using the elements above described are infringing the patent granted to R. S. Reynolds, June 23, 1863, and reissued to us, as the assignees of said Reynolds, March 30, 1875, No. 6361.

We are disposed to deal liberally with those who desire to protect themselves with a license from us under the above-mentioned patents, as they are the foundation patents on Middlings Purifiers, and we are

determined to prosecute to the full extent of the law all infringers of the same.

For further particulars, address

JAS. S. WELSH, *President, Georgetown, D. C.*

Or, our Attorneys A. L. MERRIMAN & Co.,

637 *F street N. W., Washington, D. C.*

In May, 1875, the parties owning these Welch, Reynolds and Wheeler patents, filed a bill in Circuit Court United States, for the Eastern District of Missouri, against E. A. Stannard and others, (see record, pp. 150, 154,) and about the same date filed a similar bill in the Northern District of New York, against a party residing at Rochester.

These suits were withdrawn in September, 1876, on motion of complainant.

These parties also commenced a suit against the owners of the Cochrane patent to repeal the re-issue of the Cochrane patent on the ground that it was broader than the original patent. This bill was dismissed in summer 1876.

Under this association the parties retained Mr. Latrobe, and employed Mr. Merriman and A. L. Maloney to attend to the litigation under these patents at the rate of $40 per week; they were then in business together, as A. L. Merriman & Co., in Washington, so that the fee to the firm amounted to $40 per week. Mr. Maloney having been admitted to the bar in 1876.

The management of these patents was intrusted by all parties, entirely to A. H. Herr, as will appear from the testimony of A L. Merriman, rec. p. Welch, p. 33, q. 89, and p. 111, q. 9, p. 112, q. 4,

and the admission in appellant's answer to this motion, page

Before taking any responsible act, in reference to these patents, however, Herr always obtained the assent of his associates. See Herr's testimony, p. q.

In the summer of 1876, the parties composing the association being discouraged about the prospect of their patents, discontinued the suits under the advice of Mr. Davidge, Mr. Merriman and Mr. H. B. Renwick, and Mr. Herr stopped paying Mr. Merriman his weekly payments of $20, Mr. Maloney's weekly payment had been stopped in June, 1876.

Mr. Maloney had in February 1876, mortgaged his one-eighth interest in the patents for $250, and took no further interest inthe patents.

As to the feeling of these several parties in the summer of 1876, as to the Welch, Reynolds and Wheeler patents, I quote the testimony of Maloney, attorney for the owners and himself, owner of one-eighth interest, record p. 10.

Q. 60. If you were a co-owner interested in the patents to which you have referred as being set up by the defendants in the suit of Cochrane *et al. vs.* Deener *et al* Welch, Reynolds and Wheeler Patents, and that interest induced you to attend to the taking of testimony, will you explain to me why, still being the equitable owner of an interest in those patents, you did not ascertain the circumstances under which the adjustment of that suit was made in the Supreme Court of the United States?

A. Because, after my interest was transferred by me to Mr. Herr in trust, he spoke of dismissing the suits brought under those patents—the patents mentioned in the beginning of my examination—*on the*

Present: Mr. Rodney Mason, of counsel, in opposition to the motion.

At the request of Mr. Harding and consent of Mr. Mason, adjourned until Monday morning, December 3, at 10 o'clock, A. M.

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10 o'clock A. M., MONDAY, *Dec.* 3, 1877.

Met pursuant to adjournment.

Present: Mr. Harding, counsel in support of the motion, and Mr. Mason, counsel in opposition thereto.

Thereupon, the testimony of A. L. Merriman, a witness produced in support of the motion, was taken, as follows:

A. L. MERRIMAN, a witness produced in support of the motion, having been duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. State your name, age, residence and profession?

A. My name is A. L. Merriman; my age is 53 years; my residence is Washington, D. C.; and I am a lawyer by profession.

Q. 2. You were counsel in the case of Cochrane *et. al. vs.* Deener *et al.* when it was argued in the supreme court of the District of Columbia, were you not?

A. I was.

Q. 3. You were also counsel in the case when it was presented in printed arguments in the Supreme Court of the United States?

A. Yes, sir.

Q. 4. It has been stated by counsel in this case, and also in what purports to be a letter written by you to Russell Blakely, that you declined to make any argument upon the merits of the case in the Supreme Court of the United States without pay, and accordingly only filed an argument upon the question of jurisdiction, which you were anxious to have settled; is that the fact?

A. Well, not exactly. When I was retained by Mr. Herr in the case in the Supreme Court, he told me that he had employed Mr. Cady to argue the question upon the merits, and therefore he could not afford to pay much of a fee, but still he desired me to appear in the case and give such advice and counsel as I could. He paid me a small

fee, and I wrote a brief upon the question of jurisdiction alone.

Q. 5. In a letter purporting to be written by you, it is stated that in the Supreme Court the party representing the defendants came to the conclusion that it was desirable that the plaintiffs should recover; did you make such a statement in a letter to Mr. Blakely, and if such was the fact, upon what did you base such a statement?

A. I wrote a letter to Mr. Blakely, who has been an old personal friend of mine for over thirty years, but I do not know whether I made any such statement as that or not. If I did it was based upon rumors which I had heard in relation to the matter, which I did hear some time after the case was disposed of in the Supreme Court.

Q. 6. Did you argue the case in the court below?

A. Yes, sir.

Q. 7. Were you familiar with the facts of the case?

A. Yes, sir.

Q. 8. Did you superintend and take an active part in the preparation of the case?

A. In the court below?

Q. 9. For the court below?

A. Yes, sir.

Q. 10. Did you make an application to Mr. Herr for an increase of pay?

A. No, sir.

Q. 11. Did you express dissatisfaction with the remuneration?

A. Not that I recollect of.

Q. 12. Do you remember of any proceedings being initiated with reference to an application to the Supreme Court in reference to this decree, after it was made?

A. No, sir.

Q. 13. From whom did you hear the rumors to which you have alluded?

A. Mostly from Mr. Maloney.

Q. 14 How soon after the decision?

A. I cannot tell you that.

Q. 15. Do you say it was after the decision, or after the hearing?

A. It was after the decision, if I recollect right.

Q. 16. Did you hear that it was proposed to make an application to the court at that time?

A. No, sir.

Q. 17. When did you first hear that Mr. Herr had an understanding with Mr. Cox in connection with this case?

A. I never heard that he had any arrangement with Mr. Cox.

Q. 18. Did you ever hear upon what terms or in what way that suit was settled finally; I mean the suit of Cochrane *et al. vs.* Deener *et al?*

A. No, sir; I do not know that I ever did.

Q. 19. Did no discussion as to remuneration, between you and Mr. Herr, take place at any time in connection with the case in the Supreme Court?

A. No, sir; not after the first agreement; of course we discussed the matter over then a little.

Q. 20. About what date was that?

A. Probably it was month or so before the session of the Supreme Court.

Q. 21. Did this discussion take place about the time that Mr. Herr paid you the $40 on account of the argument in the Supreme Court?

A. No; I guess it was before that. I think he did not pay anything at that time, though I will not be certain about that. My impression is that at the time we made the arrangement he did not pay anything.

Q. 22. Was it in that neighborhood?

A. It might have been two or three weeks before; I do not recollect particularly about it; or it might have been at that time, I cannot say; but my recollection is that it was about a month or six weeks prior to the session of the court that this arrangement was made.

Q. 23. What was the nature of the discussion?

A. It was only as to the amount of the compensation; that is all. He stated that he engaged Mr. Cady to prepare a brief upon the merits, and therefore he did not feel like paying a very big fee to anybody else.

Q. 24. You had had charge of the Welch patents as counsel, under a salary, for some time previous, had you not?

A. Yes; up to some time in the summer of 1876. I do not recollect the exact time when I quit.

Q. 25. Was your salary discontinued then?

A. Yes.

Q. 26. Do you know why it was discontinued?

A. Yes; I suppose I know the reason. They concluded to drop all proceedings under those patents, and consequently did not want any counsel.

Q. 27. Did you understand that in consequence of this arrangement which you made with Mr. Herr in reference to the case of Cochrane *et al. vs.* Deener *et al.*, in the Supreme Court on appeal, the only service you were to render was the preparation of an argument on the question of jurisdiction?

A. No, sir; that was not the stipulation.

Q. 28. Was anything said about the nature and extent of the argument which you were to make?

A. No, sir; simply that Mr. Cady would prepare the argument upon the merits of the case. Whether there was to be any other argument put in was a question for us to determine.

Q. 29. Meaning you and Mr. Cady?

A. Yes; I suppose so—or perhaps for me. He desired me to advise with Mr. Cady in the matter.

Q. 30. Were you anxious personally to have the question of jurisdiction settled in that case?

A. Yes, sir; I desired to have that question settled, in view of the recent statute.

Q. 31. Was not that the reason why you prepared the argument upon that question?

A. That was one reason. Another was that if the Supreme Court should hold in favor of my views on the question of jurisdiction, that would affirm the case below.

Q. 32. Were you desirous and anxious that the question of jurisdiction should be decided in favor of the appellees?

A. I was.

Q. 33. Can you state to me what passed at this discussion; give me some idea as to what request you made for fees at the time the discussion took place?

A. I named my fee and he said he could not afford to give so much, and stated the reason why, and finally we agreed upon the smallest fee.

Q. 34. What fee did you request?

A. My impression is that I asked him $300 for writing

an argument, and I do not know but more; I do not recollect exactly.

Q. 35. You say he stated his reason for not giving it to you; what was the reason?

(Mr. Mason objects on the ground that it is not competent for an attorney to testify to things stated to him by his client, and the answer to this question may involve private matters which it is not proper for an attorney to disclose, nor is he at liberty to disclose them.)

(Mr. Harding says that he declines to proceed further with the examination after this instruction.)

(Cross-examination waived by counsel in opposition to the motion.)

A. L. MERRIMAN.

Originally, E. P. Welch, J. H. Welch, R. W. Welch, and H. P. Welch and J. A. Maloney owned the three Welch patents, as follows: E. P. Welch, $\frac{1}{4}$; J. H. Welch, $\frac{1}{4}$; R. W. Welch, $\frac{1}{4}$; H. P. Welch, $\frac{1}{8}$, and J. A. Maloney, $\frac{1}{8}$.

Then the interests in said patents were, by assignment of E. P. Welch, J. H. Welch, and R. W. Welch, changed so that A. H. Herr acquired $\frac{3}{16}$, and E. P. Welch, J. H. Welch, and R. W. Welch, also retained $\frac{3}{16}$ each.

Afterwards this arrangement, the Wheeler & Reynolds patent, were purchased by me (A. J. Maloney) for the parties in interest, and assigned by me so that they held interests in the last-named patents the same as in the first-named patents.

By agreement the statement of Mr. Maloney as to the interest of the parties in what are called the Welch patents, is as follows, to wit:

It is agreed that the arguments on file and the original record may be referred to by either party at the hearing of the motion.

Mr. Harding gives in evidence certified copy of bill and docket entry of dismissal in the suit of Herr and others against Stannard and others, Circuit Court, United States, Eastern District of Missouri.

Marked exhibit "G," and hereto attached.

Also certified copies of digests marked exhibits "H," "I," and "K."

Also certified copy of the bill and order for injunction in the Circuit Court of the United States for the District of Missouri, in the case of the American Middlings Purifier Co. *vs.* John A. Christian and others, marked exhibit "L," and it is agreed that the opinion of the court in that case may be referred to without printing in the record.

Mr. Mason gives in evidence certified copies of the original and reissued patents of Reynolds & Wheeler, referred to in the testimony herein, which are hereto attached, marked complainants' exhibits, 1, 2, 3, and 4.

It is also agreed that a certified copy of the decree, as set forth in the petition in the lower court, may be referred to as though given in evidence.

EXHIBIT "G."

To the Judges of the Circuit Court of the United States for the Eastern District of Missouri:

Your orators, Abraham H. Herr, James S. Welch, Edward P. Welch, Rosia W. Welch, James H. Welch, James A. Maloney, and James S. Welch, administrator of the estate of Herbert P. Welch, who are citizens of the District of Columbia, bring this their bill against Edward A. Stanard, John W. Kauffman, John T. Bronson, partners doing business under the firm name of E. O. Stanard & Co., and who are citizens of the State of Missouri, and complain and say: That on the fourteenth day of April, A. D. 1863, upon the application of Jesse B. Wheeler, a citizen of the United States, and who was the true and original inventor and discoverer of certain new and useful improvements in a machine for cleaning and purifying grain, flour, and meal, and who had complied with all the requirements of law in that behalf, the United States granted and issued to said Wheeler letters-patent, numbered 38,191, certified copies of which will be produced upon the hearing, the original of which having been surrendered, as hereinafter stated.

Your orators further state that the said Wheeler, by his two assignments, bearing date respectively January 19, 1875, and January 26, 1875, assigned and conveyed all his right, title, and interest in and to said letters-patent and

A. I stated before that this issue before the Supreme Court of the United States would terminate the matter, one way or the other; it would either invalidate our patents or would establish them, and we thought it better to discontinue the suits until the decision was rendered in this particular case.

Q. 31. What became of the association meanwhile?

A. It was understood to be still in existence.

Q. 32. What interest did you understand you had, so far as these mills were concerned, in this suit in the Supreme Court of the United States?

A. None other than so far as our patents were concerned in the suit. We did not want to lose our patents, if possible, and if the decision of the Supreme Court should be against us, it would invalidate the patents.

Q. 33. Who had charge of your suits under the Welch patents, and under the Wheeler and Reynolds patents?

A. Mr. Herr had a power of attorney to manage those suits.

Q. 34. Did you pay any attention to the conduct of those suits; and if so, what?

A. No special attention.

Q. 35. Did Mr. Herr manage it according to his own judgment?

A. At times we conferred with Mr. Herr, and he was willing enough to accept any propositions that we might make, which were advantageous.

Q. 36. Do you know anything about a written opinion being delivered by Mr. Merriman to Mr. Herr touching these suits?

A. I think there was an opinion given by Judge Merriman in reference to these suits, to the effect that we had better hold off until the decision of the Supreme Court was given in this particular case, which was before the court at the time—I mean the suits under the Welch patents.

Q. 37. Who has that opinion?

A. Mr Herr has it with the papers connected with the case.

Q. 38. What interest had Mr. Herr in these patents on which suits were brought?

A. I think probably he had three-sixteenths of the whole.

Q. 39. Do you know under what circumstances he got that three-sixteenths, and what he paid for it?

A. I do not think he paid any money; I am sure he did not; it was with the understanding that he should prosecute all these suits to the Supreme Court of the United States.

Q. 40. Including the suits brought under the Wheeler and Reynolds patents and the suit of Cochrane *et al. vs.* Deener *et al.*?

A. Yes, sir.

Q. 41. That was included, was it?

A. Oh, yes.

Q. 42. He was to prosecute all these suits through to the Supreme Court?

A. Yes, sir.

Q. 43. And he agreed to do so?

A. Yes, sir.

Q. 44. And in consideration of that he was to have a certain interest?

A. Three-sixteenths, as well as I remember.

Q. 45. He paid no money for it, as you understand?

A. No money.

Q. 46. And you held him liable for all the damages which might be recovered against you at the Pioneer Mill, and for all the damages that might accrue from your mill being stopped; did you not?

A. At that Pioneer Mill we did.

Q. 47. He was to furnish all the money necessary to carry on these suits; was he not?

A. Yes, sir.

Q. 48. Were you present at any consultation where it was determined not to make an oral argument in the case of Cochrane *et al. vs.* Deener *et al.*, in the Supreme Court of the United States?

A. Yes, sir, I was, upon one occasion when Judge Merriman and Mr. Herr met at my father's house, and he said that the counsel had agreed among themselves to put the case before the Court on printed briefs.

Q. 49. Do you know anything about your father or you

desiring Mr. Davidge to take part in the argument in this case?

A. Yes, sir.

Q. 50. What do you know on that subject?

A. Well, my father requested me to see Mr. Herr and say to him that if he would retain Mr. Davidge, and let him argue the case orally before the Supreme Court of the United States, he would pay one-half of his fee.

Q. 51. Did you understand how much Mr. Davidge's fee was?

A. $1000, I think.

Q. 52. What did Mr. Herr say in reply?

A. Mr. Herr in reply to that said that Mr. Davidge was not a patent lawyer, and he did not think he was capable of managing the case as well as Mr. Cady; that he preferred to have Mr. Cady because of his being a patent lawyer, and that he was highly recommended to him.

Q. 53. Did you hear Mr. Davidge argue the case in the court below?

A. Yes, sir.

Q. 54. And your father heard it?

A. Yes, sir.

Q. 55. Did Mr. Herr tell you how much he had paid Mr. Cady at the time?

A. No, sir, he did not tell me.

Q. 56. Did you know how much he paid Mr. Merriman for the argument in the supreme court at the time?

A. No.

Q. 57. And he did not consult with you at all as to expenses, did he?

A. No, sir.

Q. 58. You do not remember Mr. Davidge arguing the question about the reissued Cochrane patent being a different patent from the original, in the supreme court of the District of Columbia?

A. Yes, sir.

Q. 59. Do you remember his arguing that point very fully?

A. Yes, sir.

Q. 60. Did you not think at the time that it was a very strong point in the case?

A. I thought so; yes.

Q. 61. Have you ever seen Mr. Cady's argument?

A. Yes, I think I have seen his argument.

Q. 62. Have you seen it since the decision, or before?

A. Since the decision; I never saw it before.

Q. 63. Were any of the arguments of the opposing counsel shown to you before the decision?

A. No, sir.

Q. 64. Did you not think Mr. Davidge made a very strong presentation of the case in the court below?

A. That was my impression.

Q. 65. How long did he speak?

A. I judge he was speaking probably three-quarters of an hour, or an hour, as well as my memory serves me on that point.

Q. 66. Were you ever consulted by Mr. Cady in the preparation of his argument?

A. I never saw him until——

Q. 67. You did not know him at all?

A. No, sir; I was never introduced to him until a few days ago, on Friday, when I met him in the Capitol.

Q. 68. You never saw him until you saw him here in connection with this business?

A. Yes; I saw him once before, at a meeting of all the attorneys in regard to a pool that was to be formed before any suits were commenced.

Q. 69. But you never were introduced to him until this investigation began?

A. No, sir.

Q. 70. Do you know where his office is?

A. No, sir.

Q. 71. Do you know where he lives?

A. No, sir.

Q. 72. Do you know what city he lives in?

A. I do not know anything about him whatever.

Q. 73. You have been connected with the Middlings patents, as an inventor and otherwise, for how long?

A. Since the starting of the Middlings Purifier patents, in 1871.

Q. 74. Did Mr. Herr ever tell you that it would be cheaper to settle the suit of Cochrane *et al. vs.* Deener *et al.* than it would be to fight?

A. No, sir; I have no recollection of that; he said that these suits were very expensive.

Q. 75. What was your interest in the Welch patents, and the Wheeler and Reynolds?

A. I do not remember now; I think I had somewhere in the neighborhood of three-sixteenths.

Q. 76. How was it divided; give me your best recollection?

A. The Wheeler and Reynolds and Welch patents, I think, were equally divided, as well as I can remember, between Mr. Herr, my three brothers, Mr. Maloney and myself. I think we were all equally interested.

Q. 77. You think you were equally interested with Mr. J. A. Maloney?

A. Yes, sir.

Q. 78. Do you know whether a receipt was given at the time this $250 was paid in settlement?

A. A receipt for the money paid to the Cochrane owners?

Q. 79. Yes.

A. Yes; I think there was a receipt given.

Q. 80. Do you know where that receipt is now?

A. I think it is in the possession of Deener & Cissel.

Q. 81. That is not your firm at present, is it?

A. No, sir.

Cross-examination.

By Mr. Mason:

Cross-Q. 82. Had the owners of the Welch patents, before they were sued by the Cochrane parties, made a good deal of money out of the granting of licenses under those patents?

A. Yes, they had made some money.

Cross-Q. 83. About how much?

A. About $15,000 probably.

Cross-Q. 84. Did they ever make any after they were sued?

A. No, sir.

Cross-Q. 85. Did you regard you patents as valuable?

A. I did.

Cross-Q. 86. You thought them to be dependent on the result of this litigation?

By Mr. HARDING:

Q. 87. You had committed the care and management of the cases to Mr. Herr?

A. Yes, sir.

By Mr. MASON:

Cross-Q. 88. I understood you to say that you were indemnified by Mr. Herr and your father; was there any doubt in your mind as to their ability to respond to any recovery which might be had against you in the suit of Cochrane?

A. I think not.

Cross-Q. 89. They are both wealthy men, are they not?

A. Yes, sir. I should think them fully able to pay any amount of money that would be likely to be recovered in a suit of that kind.

Cross-Q. 90. They are good for $200,000 or $300,000 between them if the recovery should be for that much?

A. I could say so for Mr. Herr, but not that much for my father.

Cross-Q. 91. Your anxiety, then, in the case, was not on account of any apprehension that you might come to money loss by a recovery on the part of the Cochrane parties?

A. No, sir; we had not any uneasiness in regard to that at all.

Cross-Q. 92. Do you remember whether you ever heard it said that if this case was not submitted on printed arguments, but went over to be argued orally when it should be reached in its course on the docket, it would never be disposed of during the lifetime of the Cochrane patent?

A. No, sir. I do not know that I ever heard anything of that kind.

Re-direct Examination.

By Mr. HARDING:

Q. 93. The understanding was full and complete, then, that Mr. Herr was to indemnify you in case you lost by reason of this suit against you?

A. Yes, sir. We had no understanding with Mr. Herr, but we held him responsible.

Q. 94. And that was the reason that you had no uneasiness?

A. Yes, sir.

Q. 95. And you must have had sufficient confidence in his guarantee?

A. Yes, sir.

Q. 96. He never denied his liability?

A. No, sir.

Q. 97. And with that confidence you gave him full charge of the suit?

A. Yes, sir.

Q. 98. I mean the charge of the defence in the suit of Cochrane *et al. vs.* Deener *et al.*?

A. Yes, sir.

J. H. WELCH.

HOWARD C. CADY, a witness in support of the motion, having been duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. State your name, age, residence, and occupation?

A. My name is Howard C. Cady; my age is 55; my residence is 1105 13th street, Washington; I am a member of the bar, and have been such since 1844.

Q. 2. Do you remember the circumstance of Mr. Herr employing you to argue the case of Cochrane *et al. vs.* Deener *et al.* in the Supreme Court of the United States on appeal?

A. I do.

Q. 3. At the time he applied to you, did he propose to you to make an oral or a written argument?

A. A written one.

Q. 4. He said nothing about an oral argument; did he?

A. I should think he did. Yes.

Q. 5. What advice did you give as to the propriety of making a written or oral argument?

A. I do not think I advised him on that subject.

Q. 6. Did he state to you why he wanted you to make a written argument instead of an oral?

A. I think he told me that Mr. Davidge, who had tried the case below, had declined to argue the case except orally.

My recollection is that I inquired why he did not employ Mr. Davidge, as I found that Mr. Davidge had tried the case below; indeed, I knew that. I think he told me that he had declined to argue it in writing. I asked him if there was any reason which would affect counsel in the argument of the case other than the fact that Mr. Davidge had declined to do it in writing, and he told me that he knew of no other. I think I declined giving him an answer until I saw Judge Merriman. I said I was willing to have an interview with him, and my memory is that that resulted in an interview with Judge Merriman, at which Mr. Herr was present, if my memory serves me. I then stated to Judge Merriman that I should be unwilling to go into a case if there was any reason which would create a personal difference between Mr. Davidge and myself; that if the only objection was that Mr. Davidge had refused to go on with the argument because he was opposed to submitting it in writing, I did not think that should affect me.

Q. 7. Did you learn from Mr. Davidge or Mr Herr why Mr. Davidge was opposed to submitting it in writing, and insisted upon an oral argument?

A. I got the impression that Mr. Davidge was unwilling to argue so important a case on paper; that he did not regard that as his forte, so to speak; that while he was a very astute and learned man, yet, after all, he did not like the labor, and as a matter of taste, he did not want to submit the case in writing and did not think it ought to be submitted in writing. I will not go so far as to say that I am positive of this, but I am of that impression.

Q. 8. Why did he think it *ought not* to be submitted in writing?

A. Because, as a matter of choice, and he did not think he could do so well in writing as he could orally. I think I got the impression either from what was said or from my own observation that he felt as though he would have a better opportunity of showing his skill in an oral argument than he would to put himself on paper.

Q. 9. Did Mr. Herr at the first interview make a professional arrangement as to fees?

A. I do not think he did. I think I declined to be em-

ployed at first until I knew more about the reason why Mr. Davidge was not employed.

Q. 10. Did Mr. Herr inquire of you as to your fees, or did you arrange with him as to the fees before you entered upon the preparation of the case?

A. I think I did. I don't know whether he paid me or not, but I think it was arranged in part with me and in part with the company for which I was counsel.

Q. 11. After you had examined the case did you suggest to Mr. Herr that the labor was greater than you expected, and suggest an advance of fees?

A. I think that after he had agreed to pay me the fee which he did pay me, I stated to him that I thought I ought to have more.

Q. 12. And did he decline to accede to your suggestion?

A. He might not have declined in words, but he did in fact.

Q. 13. He certainly did not accede to it?

A. He certainly did not. He had some talk with me, or I had with him, in regard to my being paid in part by the Metropolitan Middlings Purifier Company. They were interested in having a determination adverse to the Cochrane patents, and I think were desirous that I should be employed.

Q. 14. That company did not pay you any fee in this case, as I understand you?

A. One of the officers agreed to pay me something additional, and the matter has been left open since.

Q. 15. Did he pay you anything additional?

A. I do not think I have ever been paid anything additional.

Q. 16. Nothing additional to what Mr. Herr paid you?

A. No, sir.

Q. 17. Who was the officer that proposed to pay you something additional?

A. I think it was Mr. Bramhall.

Q. 18. Who were the officers of that company?

A. I think the directors were Mr. Bramhall, Samuel L. Bean, Mr. Keyser, and E. C. Ager; and I dont know but Mr. Murdock was, and I think Mr. Phelps might have been.

Q. 19. Is that company in existence now?
A. Yes.

By Mr. JUDSON:

Q. 20. Have they an office here?
A. Yes; they have an office on Seventh street; I think the trustees have changed some since.

By Mr. HARDING:

Q. 21. Did any conversation take place between you and Mr. Herr at the time you fixed the compensation for which you would be willing to argue it, in reference to the amount of labor involved in the case, and the extent of your argument or the time to be spent?
A. I think I told him when he first came to me that I would like them (Bramhall and Herr) to make up their minds as to what was to be done after what I had said, so that I should have all the time that I could; I do not know that there was anything special said, further than that, perhaps, if my memory were refreshed, I could recollect something.
Q. 22. Do you know what the present relationship of the Metropolitan Middling Purifier Company is to the owners of the Cochrane patent; is it harmonious or antagonistic?
A. Well, I should say it is neither, so far as those words have any signification. I do not suppose there is any want of harmony between them; so far there is no open warfare.
Q. 23. Can you explain to us the nature of the arrangement which now subsists between them?
A. I do not know that there is any; I never heard that there was any.
Q. 24. You are still counsel for the Metropolitan?
A. I do not know whether I am or not; they have not done anything for a long time.
Q. 25. What was the nature of your professional relationship with them?
A. I was employed by them in quite a number of cases which I tried for them.
Q. 26. Was it on a salary?
A. No; it was for fees in cases.

Q. 27. What patents did they own?

A. They owned what is known as the Barter Patent. They owned that patent within an adjoining territory—in the State of Maryland, and in part in the District of Columbia, and they claimed to own it in the State of Virginia. They also owned an individual interest in several of what are known as the George T. Smith patents.

Q. 28. Do you know whether the owners of the Cochrane patent have sued the owners of the George T. Smith purifiers?

A. I do not.

Q. 29. Are you the counsel for George T. Smith?

A. I am not.

Q. 30. When did you receive a copy of the appellants' argument, and how?

A. Not very long before the argument.

Q. 31. Not long before you filed your reply?

A. No.

Q. 32. Do you think you received it a week before?

A. Yes, I should think I did.

Q. 33. Was it longer than that?

A. I should think it was more than two weeks; still, I am not positive in regard to that.

Q. 34. From whom did you receive that?

A. My impression is that I received it from Mr. Rodney Mason.

Q. 35. Did you have any conference with Mr. Merriman about the reply of the appellees to the appellants' argument?

A. I think I did.

Q. 36. After you received this argument of the appellants did you set about the reply on the part of the appellees?

A. If you mean by "setting about" did I commence doing so, I think I commenced very soon after I was employed.

Q. 37. Did you set about preparing a reply at any time after reading the appellants' argument—a reply to it, or to any of the points that you saw there?

A. I think I wrote a considerable portion of my argument which I meant to be a reply—if that is proper; par-

don me for saying so—after I received Mr. Mason's argument.

Q. 38. With whom did you consult in preparing your argument?

A. I consulted to some extent with Mr. Merriman as to what it should be, and I think Mr. Herr was present; whether he paid much attention to it or not I do not know; I did not intend the discussion to be so much with him as with Mr. Merriman; I also read my argument over to a gentleman whom I regarded as an expert on mechanical questions; I do not recall any one else.

Q. 39. Did you submit the argument to any one of the appellees?

A. I do not think I did; I never had anything to do with any one except Mr. Herr, so far as that goes.

Q. 40. Did you receive any specific instructions from Mr. Herr as to the argument or the points of it?

A. I think Mr. Herr felt some little solicitude in regard to the understanding which was had between Mr. Merriman and myself; Mr. Merriman had suggested that he would rather confine himself to the question of jurisdiction, and afterwards, Mr. Herr expressed some desire that I should not limit myself, but should cover the whole ground; my impression is that I expressed some want of faith in the ground as to jurisdiction, and I said that I thought it was quite as well to leave it entirely with Mr. Merriman, for I was sure I could not add anything to what he had to say.

Q. 41. Did Mr. Herr express any solicitude or anxiety because Mr. Merriman had limited himself to the question of jurisdiction?

A. I do not know that he ever did.

Q. 42. You were present when Mr. Herr and Mr. Merriman were in conference?

A. Yes, sir.

Q. 43. Was Mr. Merriman's argument ever read over to Mr. Herr in your presence?

A. No. I never saw it until it was handed to me afterwards. I tried to see it several times.

Q. 44. Did you ever see Mr. Merriman's argument before it was filed?

A. I should think not. That is until the day it was filed.

I am not very positive about that, but that is my impression.

Q. 45. Did Mr. Merriman give you to understand that he was only going to discuss the question of jurisdiction?

A. I so understood him then. I requested him personally to cover the ground of the mechanical patents also, but he seemed to be disposed to limit himself to the question of jurisdiction.

Q. 46. Do you know why he declined to discuss any other question in his argument?

A. No; I do not.

Q. 47. Did he ever intimate to you that he was not pecuniarily remunerated for any further discussion?

A. I think he did intimate to me that he was not remunerated as liberally as he ought to be.

Q. 48. Do you know whether that was a matter of discussion between himself and Mr. Herr?

A. I do not, any further than by hearsay.

Q. 49. He did complain to you that he was not sufficiently remunerated?

A. I do not know that I have a right to say that he complained.

Q. 50. He remarked?

A. I think he did.

Q. 51. Who gave you instructions or information as to the mechanical points to be made in the case; with whom did you confer; what persons gave you any advice or hints, or conferred with you as to the points to be made in the defence of this case?

A. I recollect of no one other than the two that I have named: Mr. Merriman, and a gentleman whom I regarded as a man of very considerable experience in these Middlings Purifiers, and who was to a certain extent an expert.

Q. 52. A mechanical man, was he?

A. Yes.

Q. 53. He was not familiar with the case itself, was he?

A. Tolerably so; yes.

Q. 54. And with the conduct of the case below?

A. I do not know that he was with the conduct any further than that I think he had gone over the record.

Q. 55. Have you any objection to stating his name?

A. Not at all; it was Samuel L. Bean.

Q. 56. Who is he, and what is his business?

A. He was originally, I think, admitted to the bar, and graduated at the Ann Harbor University, and subsequently became a miller in the Northwest; and it was at his mill that Mr. Barter first built the machine which he claims to be the first Middlings Purifier ever built.

Q. 57. Was Mr. Bean connected with these cases?

A. He was one of the trustees of this Metropolitan Middlings Purifier Company.

Q. 58. You stated something about your having been recommended to Mr. Herr by some of the officers of the Metropolitan Middlings Purifier Company; what is your knowledge on that subject?

A. I have none; I told you that I was under a sort of apprehension of that kind; I commenced by saying, "I supposed," and then I stopped myself by my professional apprehension that I was getting a little too far within the boundaries of speculation.

Q. 59. Is Mr. Bean still connected with the Metropolitan Company?

A. I think he is.

Q. 60. Were the Metropolitan Company interested in the George T. Smith patents for Middlings Purifiers?

A. Yes, sir.

Q. 61. Did Mr. Herr or the counsel on the other side say anything to you in reference to the diligence with which you were to prepare this case?

A. I think they urged me pretty often to be ready—crowded me some.

Q. 62. That is all?

A. That is all.

Q. 63. When you say they "crowded" you, what do you mean?

A. They kept urging me for my argument; I was rather pressed at the time, on occasions, and they crowded me for my argument, perhaps not unduly, but that is all I meant.

Q. 64. Was anything said to you about the use of drawings, or anything of that sort, in connection with your argument?

A. I think I told Mr. Herr that I should want some drawings.

Q. 65. What did he say?

A. I think he told me that I should have any drawings that I wanted.

Q. 66. Did you get them?

A. I did not.

Q. 67. Why was that?

A. For the reason that I thought it a very difficult thing to put on paper the difference between a revolving reel and a horizontal shaker, and when I came to see the cuts and illustrations which I found in one of the pamphlets which was handed me by Mr. Mason, I thought that he had entirely exhausted the subject of drawings, and I did not see that I could do much more. Indeed I think to-day that one of his drawings is a better argument against the decision of the Supreme Court of the United States in this case than any that I could have put up.

Q. 68. Had you no guide at all from any one familiar with the case as to what points had been pressed in the court below?

A. I think I heard from Mr. Merriman in regard to what was done below. I think I went over that matter with him, and I read the case itself from the report.

Q. 69. Did you read the arguments of Mr. Blake and Mr. Mason in full before filing?

A. You mean below?

Q. 70. No, no; in the court on appeal.

A. I read Mr. Mason's argument before preparing my own; Mr. Blake's I do not think I ever saw until I saw it here.

Q. 71. Did anybody say anything to you about the question of the identity of the original and reissued patents having been pressed in the court below?

A. I think that Mr. Merriman said something about that, and that was one of the matters which I requested him to cover in his argument. I did not regard that as a point which I wanted to dwell a great deal upon, as he had had the case below. I wanted to dwell more upon this point of process.

Q. 72. You mean the question of infringement?

A. Yes.

Q. 73. Did you notice whether Mr. Merriman's argument treated this question of surrender and reissue or not?

A. After it was filed I noticed that it did not.

Q. 74. Then you did not know what he had treated of until after that?

A. I tried a number of times to see his argument before it was finally submitted, but did not get to see it.

Q. 75. When did you hear that Mr. Herr had entered into an arrangement with Mr. Cox concerning the suit?

A. I never heard of it until since I have been here to-day, and I have not heard of it now any further than that one of the gentlemen in the adjoining room—I think it was Mr. Welch—began to tell me something, and I said that I did not want to know anything about it. I presume that is the subject to which you refer.

Q. 76. Yes. Did you limit yourself to the argument that you have spoken of, or did Mr. Merriman suggest that you limit yourself?

A. I do not think there was any suggestion, except as I have stated to you, that he proposed to cover the question of jurisdiction.

Q. 77. Is that all he proposed to cover?

A. That is all; yes.

Q. 78. What did you propose to cover?

A. I wanted him to cover also the question which arose upon the mechanical patents, as that remained rather an open question; still I argued the question upon the mechanical points.

Q. 79. Was it distinctly understood between you as to which of you was to discuss the question of the identity of the original process patent and the reissued process patent?

A. I do not think there was any distinct or specific understanding; it was a sort of general conference between us, as I have stated; but he seemed to be disposed to limit himself to the question of jurisdiction, and I desired him to add to that whatever he might think best to say in regard to mechanical patents; and further than that I do not think our conversation extended.

Q. 80. How many interviews had you?

A. Several; not less than two or three, and there might have been more than that; I think I called upon him several times to get a copy of his argument, which I did not get, and so I repeated my call and probably had some general conversation which I do not recollect.

Q. 81. Did you have a conference with him after you had seen the appellants' argument?

A. I think I did after I had seen Mr. Mason's argument.

Q. 82. Did you then understand from him what portion of that argument he would reply to?

A. No further or otherwise than I have already stated.

Q. 83. I think I asked you if you showed your argument to Mr. Herr at any time during its preparation?

A. I do not think that I did.

Q. 84. You never informed him what points you were going to discuss?

A. No further than in a general way, speaking as I have already testified.

Q. 85. The principal information you derived about the case below and the points there argued was from Mr. Merriman, was it not?

A. And partly from inquiries which I made of Mr. Mason; I went to Mr. Merriman and learned all I could from him, and I then went to Mr. Mason; I understood that the argument of Mr. Davidge below was in the form of notes, and I tried to get those notes, but never succeeded in doing so; Mr. Merriman, I think, said Mr. Mason had them, and Mr. Mason did not feel that he was called upon to let me have them; that is my memory.

Q. 86. You say that besides getting information from Mr. Merriman, you got information from Mr. Mason?

A. I talked with Mr. Mason in regard to the conduct of the case below.

Q. 87. Then the only two persons you got information of as to the conduct of the case below were Mr. Mason and Mr. Merriman?

A. I do not recollect any one else, except that information may have come to me in a general way, and except what appeared from the printed record of the case.

Q. 88. While the appellants were crowding you into filing your argument, did Mr. Herr call upon and crowd you also?

A. I think he called upon me and told me that the other side were urging that we should be ready with our argument.

Q. 89. Did you submit your argument to Mr. Merriman before you filed it?

A. I think not.

Cross-examination.

By Mr. MASON:

Q. 90. How long had you been engaged in suits connected with the process of making flour by the Middlings Purifier, commonly called the "new process," when you were employed by Mr. Herr?

A. Since some time in the year 1872.

Q. 91. And this employment by Mr. Herr was in the fall of 1876, was it not?

A. It was in the autumn of 1876; I should say that it was in October, 1876, that I was employed.

Q. 92. During the time you were employed in business relating to the manufacture of the new process flour, state whether you had not given to it a very large portion of your time?

A. I had.

Q. 93. Were you not familiar with nearly all the machines in use?

A. I do not know that I can say that I was. It is a rather broad question; I understand there are a great many such machines. I was pretty familiar with several machines.

Q. 94. So far as the process was concerned, were not all the machines substantially the same?

A. That is a question about which you and I may differ very materially.

Q. 95. This argument was in course of preparation just before the presidential election in the fall of 1876, was it not?

A. Yes; I was employed in October, 1876, as near as I can recollect.

By Mr. HARDING:

Q. 96. Do you associate those two events—the preparation of your argument and the presidential election?

A. I associate the preparation of the argument with the presidential election solely from the fact that that occurred

in November, 1876, and my employment was in October, 1876.

By Mr. Mason:

Q. 97. Do you not remember that for some weeks after the court met in that year, on account of the absence of attorneys attending to the political campaign, the court had scarcely any business to transact, and finally adjourned over until after the presidential election?

A. I recollect in general the fact that there was a want of attendance to the cases as they were called on the docket, by reason of their political engagements.

Q. 98. And do you not remember that my reason for urging you forward with the preparation of your case was that if you could get it submitted while the court was thus unemployed we would undoubtedly get an early decision in it?

A. I believe you did give that reason.

Q. 99. And that was because of my anxiety to have the preparation of the arguments hastened?

A. I could not swear to that.

Q. 100. Did I not say so?

A. I think you did give that as a reason.

Re-direct-Examination.

By Mr. Harding:

Q. 101. Did Mr. Herr urge you too, or did he tell you?

A. I do not know that I have said that he urged me in the way of pressure. I think he called upon me once or twice to say he was being urged by them, or that they were urging him—some such idea as that.

Q. 102. "They," meaning the appellants?

A. Yes.

Q. 102½. Have you tried any other patent cases besides those connected with purifiers?

A. I have been engaged in one or more sewing-machine cases, and I also had some experience before that in another patent case. With the exception of the sewing-machine cases, my experience in patent cases, prior to 1872, was comparatively limited.

Q. 103. How long were you solicitor for this Metropoli-

tan Middlings Purifier Company, of which, among other things, they owned the Smith patent?

A. I acted as solicitor and counsellor for them in 1875, I think, and from that time on.

Q. 104. Were you connected with any company or association before 1875?

A. No company.

Q. 105. Any individuals?

A. Yes; individuals.

Q. 106. What individuals?

A. I acted for two or three individuals who were interested in the Barter patent.

Q. 107. Was it in prosecuting or defending suits?

A. Both; and also before the Patent Office. We had a very heavy interference case between Barter and Smith, in which I acted as counsel on the Barter side.

MONDAY, *Dec.* 3, 1877.

By Mr. HARDING:

Q. 108. Can you now fix the date when the agreement for your employment by Mr. Herr was perfected?

A. I received his share of my fee in full on the 9th of October, 1876. That was the date when I consider my employment in that case was perfected.

Q. 109. When did you first see the appellants' points in this case?

A. On the day when they were filed.

Q. 110. When did you first see your colleague's argument in this case?

A. The same day.

Q. 111. That is, the day it was filed.

A. Yes, sir.

Q. 112. Had you previously made requests, and endeavored to see your colleague's argument?

A. I had; I find that I had made an entry on the 31st of October, "Saw Judge Merriman as to argument, and proposed reading that of each to the other."

Q. 113. That was never done, was it?

A. Never.

Q. 114. The arguments were not prepared at that time, were they?

A. I understood that they were written substantially. I desired, after hearing all I could, to make any further addition to my manuscript which should seem to be proper.

Q. 115. Do you know why the appellant's points were not submitted to you earlier?

A. I do not; I had the argument of Mr. Mason about the middle of October.

Q. 116. Did you not agree with Mr. Merriman or refer to him the discussion of the defence as to the effect of the prior patent granted to Cogswell & McKiernan?

A. I recall the fact that I especially desired Judge Merriman in one of our interviews to cover the ground affected by the Cogswell & McKiernan transactions, and so left that subject with him.

Q. 117. You never knew whether he had treated of it till after the filing of the argument?

A. I did not.

By Mr. Mason:

Q. 118. When were you first approached by Mr. Herr with the proposition to employ you to argue that case?

A. I think by reference to a copy of a letter which I wrote to him on or about the 20th of September, '76, I was then first spoken to.

Q. 119. Did you make examination of the record between the time when you were first spoken to and the 9th of October?

A. I think I did read some of the record.

Q. 120. Were you present at the hearing of the case below?

A. I was not, except as I was casually in court for a short time one day when the case was on trial, only looking on as I was passing through the court-room.

Q. 121. Were you at the time you were employed and before and since that time a stockholder in the Metropolitan Middlings Company of which Col. Bramhall was the president?

A. Yes.

The witness desires to add: The answer of the defendants limited inquiry upon the subject of whether some of the reissues were not broader than the original patents, and

therefore I was led to ask Judge Merriman to cover whatever ground he thought best in that connection.

Q. 122. To whom did you apply for the copy of Mr. Davidge's argument for the defendant in the court below?

A. To Judge Merriman and Mr. Mason; I offered to pay one-half of the expenses of the stenographer's report on the 17th of October, which offer was declined; Judge Merriman had not the copy of the argument, and therefore I went to Mr. Mason; on the 20th Mr. Mason furnished me with a copy of the decision, which I returned to him, after having copied myself.

Q. 123. The copy of the decision that was given to you was the decision of the lower court?

A. Yes; whether it covered more than the ground with reference to jurisdiction I do not now recollect; it was a stenographic report; Mr. Mason offered me a copy of the stenographic report of the decision, but did not think it was his business to give me a report of Mr. Davidge's argument.

(Mr. Harding requests witness to furnish him with a copy of the decision which was given to witness.)

(The witness states that he will furnish Mr. Harding with the copy that he had made.)

Cross-Examined.

By Mr. MASON:

Q. 124. Did I not tell you when you came to me for a copy of the report of Mr. Davidge's argument, that at the time of the trial I wanted Mr. Herr to join with me in paying the expense of the stenographer, and that he refused to do it; and that I paid all the expenses myself, and that I did not then think that there was any reason that he should be sending to me for copies of the papers that I had thus obtained?

A. I think you said that in substance, and it was for that reason that I made the offer to pay half the expenses myself.

HOWARD C. CADY.

EDWARD P. WELCH, a witness in support of the motion, having been duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. What is your name, age, residence, and occupation?

A. Edward P. Welch; 39 years old; reside at Georgetown; occupation, running a mill.

Q. 2. Were you one of the defendants in the suit of Cochrane *et al. vs.* Deener *et al.*?

A. I was.

Q. 3. When did you first hear that a settlement had been agreed upon in case the suit was decided in favor of Cochrane on the appeal in the Supreme Court of the United States?

A. I knew that there was a settlement after the decision was made in the Supreme Court of the United States, and not before then.

Q. 4. How did you come to hear of it then?

A. Mr. Herr told me.

Q. 5. What did he tell you?

A. He told me that he had made a settlement for $500 for his mill and $500 for my father, Jas. S. Welch's mill.

Q. 6. Did you take any part in the conduct of the suit of Cochrane *vs.* Deener?

A. No.

Q. 7. Did you know Mr. Cady, who argued the counsel on appeal in the Supreme Court?

A. No.

Q. 8. Did you know in what city he lived?

A. No; I had no acquaintance with him.

Q. 9. Who had charge of the defence of the suit?

A. Mr. A. H. Herr.

Q. 10. Did you regard Mr. Herr as indemnifying you against loss or damage by reason of losing the suit of Cochrane *vs.* Deener, so far as the Herr mill was concerned?

A. Yes, sir.

Q. 11. Did any of the defendants furnish any money to defend the suit?

A. No; Mr. Herr furnished it all.

E. P. WELCH.

R. W. WELCH, a witness in support of the motion, having been duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. State your name, age, residence, and occupation?

A. My name is R. W. Welch; my age is thirty-three; my residence is Georgetown, D. C.; my occupation is that of a miller.

Q. 2. Were you one of the defendants in the suit of Cochrane *et al. vs.* Deener *et al.?*

A. Yes, sir.

Q. 3. Did you pay any attention to the defence of that suit?

A. Yes, sir.

Q. 4. Who had charge of the defence?

A. Mr. Abraham H. Herr.

Q. 5. What knowledge have you of the terms of settlement, or of an arrangement to settle the case of Cochrane *et al. vs.* Deener *et al.?*

A. Mr. Herr had the entire management of the case, and I think by power of attorney, as well as I recollect, from us for a certain consideration—a certain interest in the patent—and he managed the case himself. He had to spend all the money, and I understood that both our mills and Mr. Herr's had been licensed. I do not exactly recollect the sum, though I think it was $500 for our mill and the same for Mr. Herr's mill.

Q. 6. Under what circumstances did you learn the terms of this agreement?

A. I learned them from Mr. Herr.

Q. 7. When?

A. I do not recollect exactly the date, but I know it was before the decision of the Supreme Court here.

Q. 8. How long before?

A. Probably two or three months.

Q. 9. What did he say to you?

A. He said that our two mills would cost a thousand dollars for a settlement.

Q. 10. Did he say they had been licensed?

A. I understood that they were licensed. Yes, sir.

Q. 11. He told you that they were licensed, did he?

A. Yes, sir.

Q. 12. Did he tell you how he came to make this agreement?

A. I do not recollect that he did.

Q. 13. Did he tell you why the other side had agreed to it?

A. My understanding of it was that the matter would go on on a brief in order to reach a quick decision. I think that was the arrangement that was made.

Q. 14. What knowledge have you on the subject of the employment of Mr. Davidge to argue the case in the Supreme Court of the United States?

A. Mr. Davidge was employed to make the argument before the supreme court of the District of Columbia. He was not employed to make the argument before the Supreme Court of the United States.

Q. 15. Have you any knowledge of your further offering to pay part of the expense if he should be employed?

A. I heard my brother Jim say that he would pay half of what Mr. Davidge charged if he would make the argument here. My father sent Jim to see Mr. Herr, to tell him that he was anxious that Mr. Davidge should be continued.

Q. 16. Had you heard Mr. Davidge argue the case in the court below?

A. I had.

Q. 17. Were you satisfied with his argument?

A. I thought he made a very fine effort.

Q. 18. Do you know anything about Mr. Davidge wanting to argue the case orally?

A. No, sir; not particularly.

Q. 19. Do you know when the money was paid for this license?

A. As I never saw it, I do not know when it was paid?

Q. 20. Do you know anything about your father giving a note?

A. No, sir.

Q. 21. Did you never hear of that?

A. No, sir.

Q. 22. Did you never hear about part of the money being paid by note?

A. No, sir; I heard his portion of it had been settled.

Q. 23. Did not Mr. Herr tell you at the time he told you that part of the money was to pay the note?

A. No, sir; he did not say anything about the conditions of the settlement at all, as to how it was settled, but that it was settled.

Q. 24. After he told you that, you did not feel any more care about it, did you?

A. No, sir; I did not.

Q. 25. It relieved your mind of all care and anxiety on the subject?

A. It did.

Q. 26. Did you think you were pretty well out of it by getting that settlement?

A. I thought our mills were relieved of an incumbrance of that kind.

Q. 27. Would it have been a serious inconvenience to you if your mills had been stopped?

A. I should think so.

Q. 28. Give me some idea of how much inconvenience it would have been?

A. Do you mean to stop them permanently?

Q. 29. Yes; to stop the use of that process apparatus at your mills?

A. It would have been a loss according to the capacity.

Q. 30. Can you give me some idea, if an injunction had been granted against the purifying process, how far it would have affected you?

A. I cannot exactly understand the question.

Q. 31. If an injunction had been granted against you in the winter of 1877—January, 1877, we will say—

The WITNESS, (interrupting.) What loss would we have sustained?

Q. 32. Yes; suppose your mill had been stopped from the use of this process?

A. Having a demand for all the flour we can turn out, if it had been stopped a month we would have lost 5,000 barrels of flour.

Q. 33. What loss would that have been to you?

A. At fifty cents a barrel, it would have been $2,500.

Q. 34. Do you not think that the value of the process is worth more to you than fifty cents a barrel?

A. It might have been.

Q. 35. Do you not think it would have been nearer a dollar?

A. Summer patent flours do not seem to be as popular as spring wheat patent flours, and they do not seem to bring the prices that spring wheat patents do.

Q. 36. Do you know Mr. Cady?

A. I met him to-day to speak with him for the first time.

Q. 37. Do you know where he resides?

A. I do not.

Q. 38. Did you ever confer with him about the argument of the case at all?

A. I never spoke to him until to-day.

Q. 39. Did he ever visit your mills to see the process work?

A. Not that I know of.

R. W. WELCH.

(Cross-examination waived by counsel in opposition to the motion.)

Adjourned to 10 o'clock A. M., to-morrow, November 28th, 1877.

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10 o'clock A. M., *November* 28, 1877.

Met pursuant to adjournment.

Present: Messrs. George Harding and F. M. Judson, counsel on behalf of the motion; Messrs. Rodney Mason and Walter S. Cox, counsel in opposition thereto.

Thereupon Walter S. Cox, Rodney Mason, and Charles F. Peck, witnesses in opposition to the motion, were duly sworn, and testified as follows:

Testimony in Opposition to the Motion.

Witnesses examined by Mr. Mason.

WALTER S. COX, a witness in opposition to the motion, having been duly sworn, testified as follows:

By Mr. MASON:

Q. 1. State your name, age, residence, and occupation?

A. My name is Walter S. Cox; I am of lawful age; residence, Washington, D. C.; occupation, lawyer.

Q. 2. Were you one of the complainants in the case of Cochrane *et al. vs.* Deener *et al.*?

A. I was.

Q. 3. Are you now a member of the American Middlings Purifying Co.?

A. Yes, sir.

Q. 4. What relation did you occupy toward this case?

A. This case was placed in charge of Col. Rodney Mason, and at his request I signed my name to the bill and other papers in the case as solicitor, but took no part in the conduct of the case.

Q. 5. Were you ever approached by the defendants, or any of them, with reference to an adjustment of the matters in issue between the parties?

A. While the case was pending in the court below, I had several conversations—casual, as I supposed them to be, not concerted—with Mr. A. H. Herr, in which he urged that it would be for our advantage to dismiss this suit and to pool our patents with those of the defendants, and perhaps some others; he spoke with great emphasis of the value of the Welch patent particularly, and assured me that the Cochrane patent was totally impracticable; that flour could not be manufactured under it, and that we would not find it available at all, except in combination with that of the defendants. I told him on all these occasions that we thought this suit ought to go on to a conclusion, and that we could not listen to any overtures about pooling the patents while the suit was pending; and as the effect of any such arrangement would be to convert it into a collusive suit, we would not be parties to anything of the sort; he continued these suggestions about pooling the patents, and these assertions about the necessity of a combination with the Welch patents and others, until long after the case was finally decided. After the case was decided, he asked if we would not consider the subject of pooling the patents; I told him that we were then open to propositions.

By Mr. JUDSON:

Q. 6. You mean when the case was decided in the lower court?

A. No, here in the Supreme Court; nothing, however, material to the preesnt inquiry, I think, transpired until after the decree in the court below dismissing the bill.

I should perhaps have stated before that among the papers which I signed as solicitor was a stipulation, a copy of which is set out in our printed answer to this motion. This stipulation Col. Mason brought to me to sign, and it was drawn up, I think, in the hand-writing of Mr. James A. Maloney, and signed by Mr. Merriman, as solicitor for the defendants; whether before or after I signed it I do not remember. This was a stipulation about submitting the case on printed arguments. It is on file now in the office of the clerk of the Supreme Court of the United States. While the record was being prepared for the Supreme Court, Mr. Herr informed me that Mr. Davidge had advised the defendants not to carry out the stipulation for submitting the case upon printed arguments. I believe I expressed some surprise, and said it would be better for them to do it, and nothing else took place then. Some time afterwards Mr. Herr called again, and I told him that the defendants had resolved not to carry out that stipulation unless we would agree beforehand upon some scheme for pooling the patents, and would release them from all damages. I told Mr. Herr that the claim was utterly preposterous; that we could not listen to anything of the sort, and that if the parties proposed to act in that manner I would not have any further communication with them about the case. I told him further that we should go on to carry out the stipulation as far as we could, and would file the record; that Col. Mason would submit his printed argument, and that I would file that stipulation in the Supreme Court, and see if we could get the court to enforce it. The record was brought up and the stipulation was filed here, and I did not expect to hear anything further from the defendants.

Some time after that Mr. Herr called anew with another proposition. He said that if we would agree upon a sum certain, which should cover all claims for damages for the past use of this machinery in the mills in Georgetown, and also for the future use during the continuance of our pat-

ent, he could get the defendants to carry out this agreement for the submission of printed arguments, and not otherwise. I told him I would have to submit that to the other gentlemen in interest. I consulted Mr. Mason and Mr. Charles F. Peck, the only other practicing lawyers besides myself in our party, except Mr. Phillip, who was out of town. While we were all averse to entering into any negotiations with the defendants pending the suit, we agreed that there was no legal objection to ascertaining the amount of our money demands in advance, and that if the hearing could not be speeded otherwise, it had better be done. I think that the sum of $2,000 or $2,500 was suggested as a basis for such an arrangement, and I mentioned that to Mr. Herr. He had to consult with his associates, and he came backwards and forwards, and we had several meetings and could not agree upon any terms involving a larger amount than $1,000, and he endeavored to beat me down considerably below that, but I refused to fix upon anything lower; and finally we arranged that if he would have the defendants carry out this stipulation for submission, in case of our ultimate success, we would not exact more money than $1,000 for the past and future use of the machinery in these mills. The use of the machinery in any other mills or of similar machinery in any other mills, and the interest in the invention in controversy, were not the subject of our arrangement at all, but were considered as left to be fought over in this suit.

Mr. Herr, I think, states it too strongly when he says that I peremptorily refused to give any written agreement. I did not give a written agreement, but I did not assign as a reason for it that such an agreement, written or oral, would taint the case, as might be inferred from his testimony—though I do not think he meant to say that. But I did not give a written agreement because, first, I was not prepared with anything at the time, and did not wish to draft any paper hastily which might be susceptible of misconstruction, and if I should give a paper at all I preferred to prepare it deliberately. Another reason why I was loth to give any written obligation was—and this I rather think I mentioned to him—that we had nothing from the defendants, and had no guarantee that they would carry out the stipulation, and from what had occurred I had no confi-

dence that they would; and I was loth, therefore, to give any written obligation which would be one-sided, and which they might make some sinister use of if they should finally conclude to repudiate this agreement. I therefore gave Mr. Herr simply our verbal assurance as to the limit of our pecuniary demand in case of our success, conditioned upon the faithful performance of the stipulation, and he was satisfied with it.

I should say here, that this arrangement was made only under the belief, founded upon his representations, that the case could not be heard otherwise upon printed arguments, and its only object was to accomplish that result.

I do not remember that anything else occurred between Mr. Herr and myself until after the decision in the court above; he then came to see me and appeared to be uneasy about the condition of the case and very anxious to get it off his mind, and insisted upon my receiving $1,000 at once; and also desired that the amount should be divided into two parts and $500 assigned to each mill; I told him that we had not yet obtained the mandate from the court above, but, if he pressed it, I would take the money from him and hold it until the mandate was sent down and the decree entered, and would then apply the money to the decree, according to the stipulation.

There was nothing said about the costs in our agreement; when the bill of costs was sent to me I enclosed it to Mr. Herr, expecting him to pay it; he is mistaken, therefore, in his recollection, in saying that nothing was said to him afterwards about the costs; he saw me afterwards, and I spoke to him about the subject and he seemed to think it very hard that he should have to pay the costs after having already paid so much money; I told him that I could not relieve him from it, but did not press the payment at that time, and mentioned the subject to the other gentlemen concerned and they insisted upon the costs being collected; I think some of them had a conversation with Mr. Herr on the subject; I believe either Col. Mason or Mr. Peck so informed me.

(Mr. Harding objects to the hearsay statements of the co-plaintiffs.)

The costs have not yet been collected, simply through some oversight.

By Mr. MASON:

Q. 7. Did you pay the costs in the Supreme Court?

A. The treasurer of our company, I think, paid the bill after the original bill had been sent to Mr. Herr.

Q. 8. That was in order to get the mandate?

A. Yes; that was in order to get the mandate, and I think I called upon him for the costs.

By Mr. JUDSON:

Q. 9. That is, the costs of the Supreme Court?

A. Yes; perhaps I might as well state here that although nothing else occurred between myself and Mr. Herr, yet we soon heard some rumors that our decree was to be impeached as collusive. Some of us, I think, attended the Supreme Court on some of the motion days, expecting some move to be made in that direction, and for that reason we refrained from applying for the mandate until the end of the term, so as to give full opportunity to ventilate that question.

By Mr. MASON:

Q. 10. Were affidavits prepared to present before the court in case that motion should be made?

A. Yes.

Q. 11. Mr. Herr referred yesterday in his testimony to having given an affidavit in April last; was that given to be used in case that motion should be made?

A. I think that was given to be used in case such a question should arise; the rumors, I think, were that all the defendants were charged with collusion with us, and perhaps we heard that some of the defendants themselves had asserted it; I think I either wrote a note to Deener, Cissel & Co., or wrote a paper for them to sign, and sent it to them, either to disavow or state what the facts were, and they gave us a paper, in which they disclaimed any responsibility for these rumors, about the time that Mr. Herr made this affidavit.

Q. 12. I understand you to say that your agreement with Mr. Herr was for the round sum of $1,000 for the liability of the defendants?

A. It was.

Q. 13. And not for $500 on each mill?

A. No; we had nothing to do with the division of it; I gave two separate receipts at his request, one to him and one to Mr. Welch, for $500 each.

Q. 14. And that was in consequence of the arrangement before mentioned?

A. Yes, sir.

Q. 15. Was it any part of your purpose, or, so far as you know, the purpose of any of your associates, by consenting to that arrangement with Mr. Herr in behalf of the defendants, to influence their conduct in any way in the defence of the case?

(Mr. Judson objects to the question as leading.)

A. It certainly was not. I supposed that the defendants had interest enough in their patents to induce them to defend them. The written arguments of the appellants were made in anticipation of an earnest defence, as will appear from the arguments themselves, I think.

Q. 16. Did Mr. Herr, or any of the defendants, ever intimate to you in any way that they had ceased to take an interest in their patents?

A. They did not. Mr. Herr expressed great confidence in their success to me.

Q. 17. Is there anything else that belongs to this inquiry which you have not stated, that is important to the inquiry?

A. It may, perhaps, be well to state that I was not acquainted with the relations between Mr. Herr and the nominal defendants in the case, except so far as he told me that he felt bound to defend them as his lessees, and so far as I had seen his interests set out in the bill filed by himself and the Welches against Cochrane and some of his associates before our suit was commenced. And all that Mr. Herr stated yesterday in his testimony in reference to the suits instituted by him and his associates, about the dismissal of these suits, &c., was entirely new to me.

Cross-examination.

By Mr. HARDING:

Cross-Q. 18. Can you fix the date, in any way, of the final consummation of the agreement to accept $1,000 to grant the license to Mr. Herr?

A. I cannot, except by reference to the day when the arguments were filed; part of the ninety days within which printed arguments must be filed under the rule had elapsed; I only know that it must have been some little time before the arguments were filed on the part of the appellees.

Cross-Q. 19. How long after the filing of the record and stipulation and the docketing of the case was it?

A. It is impossible for me to say; it was between that and the filing of the arguments for the appellees.

Cross-Q. 20. Do you know how long it was after the docketing of the case before the record in the Supreme Court was printed?

A. I do not; I did not give any attention to the case at all when it came up here.

Cross-Q. 21. Can you fix the date when you sent the bill of costs to Mr. Herr?

A. I cannot; I sent it the very day on which it was received from the clerk's office here.

Cross-Q. 21. Do you know what that bill of costs amounted to?

A. My impression is that it was either $270 or three hundred and seventy odd dollars.

Cross-Q. 23. The costs were the costs in the Supreme Court of the United States?

A. Yes, sir.

Cross-Q. 24. Who told you that there were reports that the suit was collusive; upon what did you base that remark?

A. It is difficult for me to recall now from whom I got the information; I think Mr. Herr, among others, told me.

Cross-Q. 25. Did you learn who the parties were, or was any information given to you that led you to suppose who the parties were?

A. I think I knew at the time, but I cannot recall them just now.

Cross-Q. 26. Were those parties resident in this District?

A. I think there were some residents and some non-residents.

Cross-Q. 27. Were they connected in any way with the Metropolitan Middlings Purifier Co.?

A. I can't say; now I think of it, my impression is that

some of the millers in Georgetown—perhaps Mr. Ray and Mr. Shoemaker, were both reported as having made the assertion in answer to inquiries from parties abroad who had been here making inquiries as to the result of the suit, &c.

Cross-Q. 28. You cannot give me any clue more definite to the parties making assertions of collusion?

A. No; I cannot at this time.

Cross-Q. 29. Have you the paper which you drew up for Deener, Cissel & Welch, the defendants, to sign?

A. I think it is in the office of the Middlings Purifier Company.

Cross-Q. 30. Will you produce it?

A. I will if I can.

Cross-Q. 31. Have you a copy of the affidavit which you drew for Mr. Herr?

A. No; we had that original affidavit in the same office.

Cross-Q. 32. Have you it there?

A. I believe so; it was left there once.

Cross-Q. 33. I wish you would bring me that too.

A. Yes, sir.

Cross-Q. 34. Have you ever applied to have the costs taxed in the supreme court of the District of Columbia?

A. No.

Cross-Q. 35. When did you last hear from Mr. Herr about the costs in the Supreme Court in reply to the bill which you sent him?

A. Some time ago; I have seen him only once or twice since that, and not long after that.

Cross-Q. 36. Mr. William H. Phelps, Mr. Rodney Mason, yourself, (Mr. Cox), and Mr. Charles F. Peck, are all counsellors-at-law?

A. Yes.

Cross-Q. 37. And were co-owners and co-plaintiffs in this suit?

A. Yes.

Cross-Q. 38. In what way was Mr. Blake connected with the suit?

A. He was employed as counsel with Mr. Mason.

Cross-Q. 39. Had Mr. Hecker anything to do with this case?

A. No.

Cross-Q. 40. Was the license to Mr. Hecker any part of Mr. Blake's consideration for his argument here?

A. I do not know personally. I had nothing to do with it personally.

Cross-Q. 41. And you do not know whether you paid Mr. Blake or not?

A. I do not.

Cross-Q. 42. Who attended to filing the records in the Supreme Court of the United States?

A. I do not remember whether I or Mr. Mason did. I believe I assisted him in getting it up for the purpose of filing it here, but I do not remember who brought it up. I remember bringing up the stipulation.

Cross-Q. 43. Do you know whether the record was ever printed in the Supreme Court, or whether printed copies were filed of the entire record by the plaintiffs?

A. I think the latter, in order to save time.

Cross-Q. 44. Do you know when they were deposited?

A. I do not.

Cross-Q. 45. Did you deposit them?

A. I cannot recollect, but I think not.

Cross-Q. 46. Who do you think deposited them?

A. I think Col. Mason did.

Cross-Q. 47. Did you prepare the statement of Mr. Herr that is annexed to the answer to this motion?

A. I wrote out a sketch of it and gave it to him, but he altered it some, and wrote it in his own handwriting afterwards.

Cross-Q. 48. Can you fix the date in any way when Mr. Merriman added his name to the stipulation which was filed in the Supreme Court on October 5, 1876, to which you have referred?

A. I cannot; I think the paper was brought to me, though, with his signature, about that time.

Cross-Q. 49. You cannot be positive, though, that it was brought to you at that time, can you?

A. I am pretty sure it was within a few days of that time.

Cross-Q. 50. And it remained in your possession until it was filed in the Supreme Court on the 5th of October, 1876?

A. Until it was filed here.

Cross-Q. 51. The endorsement on the back was made about the time of filing, I suppose?

A. I presume that was made here in the Supreme Court of the United States about the time of filing.

Cross-Q. 52. This stipulation was never filed in the lower court?

A. No.

This witness appeared again on the 3d December, and stated that he has made search for the papers called for above, and has been unable to find them.

WALTER S. COX.

RODNEY MASON, a witness in opposition to the motion, having been duly sworn, testified as follows:

By Mr. Cox:

Q. 1. State your name, residence and occupation?

A. My name is Rodney Mason; my age is fifty-three; my residence is Washington; and I am an attorney-at-law.

Q. 2. State your relations to the suit of Cochrane *et al.* *vs.* Deener *et al.*?

A. I was one of the parties complainant, holding an undivided interest in the patents which were the subject-matter of the complainants' case, and, pursuant to an arrangement which had been made on the part of all the owners of the patents, the management of such suits as might be instituted was entrusted to the five parties resident in the city of Washington, exclusive of myself, namely: Walter S. Cox, Wm. H. Phillip, John M. Van Buskirk, John O. Evans, and Charles F. Peck; they charged me with the management of the legal business, particularly with the conduct of the suit which it was determined to bring against the defendants, members of the firm of Deener, Cissel & Welch, millers, of the city of Georgetown, in this District; I had the management and control of the case, advising from time to time with my associates, particularly with Mr. Cox, who was the solicitor of record, and Mr. Peck, and sometimes with Mr. Phillip; I retained Mr. Charles S. Blake, of New York, as our counsel; the retaining fee, however, was not paid by

the complainants, but was paid by George Hecker, I think his name is, of the city of New York, with whom we negotiated a settlement of a claim which we had against him for the alleged infringement of his patent, and by the terms of which it was agreed that he should pay such a sum of money as might be charged for a general retainer in our business by Mr. Blake, and also by Edward S. Renwick, whom we had engaged as a professional expert in the case; the other fees of Renwick and Blake have all been paid by the complainants, or by their successors, the American Middlings Purifier Company, a joint-stock company incorporated under the laws of the District of Columbia, and composed of the original owners of the Cochrane patent, with one addition, Mr. Lewis J. Davis, who owns two shares only of the stock of the company, of $100 each, and who was not among the original complainants; but it was understood that that company were to pay all the liabilities of the parties who had owned the patent, and who were complainants in this case.

Q. 3. State whatever you know that is material to the present inquiry in your own way?

A. We had numerous consultations among ourselves and with Mr. Blake as to where it was advisable to commence a suit, and who should be selected for defendants in the first suit, which we intended to institute and press to a final hearing for the purpose of establishing our rights under the patent.

We discussed the condition of the business in a number of the Eastern circuits, and would have brought a suit in New York except for the state of the docket there, which Mr. Blake informed me was such that it would be at least eighteen months before a case could be brought to trial there.

(Mr. Harding objects to the statements of Mr. Mason as to the events preceding the suit, and the motives which induced him to sue the present defendants, as irrelevant to the questions at issue, and as wholly immaterial.)

I made exertions to find a defendant resident in the State of Connecticut, where I was informed the condition of the business was such that an early trial could be expected, but was unable to find any mill there that was infringing our patent. While this matter was under con-

sideration, Mr. Herr, the Welches, and others who were owners of the patents of E. P. Welch, of Reynolds & Wheeler, which have been adverted to in the testimony heretofore taken on this motion, commenced proceedings against us in the supreme court of the District of Columbia "against us"; that is, against the owners of the Cochrane patents, which were the subject of the suit in this case. I finally concluded to sue them in this district, and I was moved to that selection mainly by the fact that, as the owners of patents which they claimed to cover the subject-matter of the Cochrane patents, I supposed they would be anxious to speed the case, and it was very much to our interest that no delay that was unnecessary or avoidable should take place, as at that time the Cochrane patents had but little over four years to run. (This was in the fall of 1875, and the patents will expire on the sixth day of January, 1880.) After I commenced the proceedings against them, I found that it was as I expected it would be—that being interrupted in the use of their patents, for the purpose of granting licenses, they expressed their anxiety to have the case proceed rapidly. They filed their answer not a great while after the bill was filed. The replication was filed immediately afterwards, and we commenced at once to take the testimony. I took my opening testimony, and then announced to them that the opening case was concluded; whereupon they proceeded with the taking of their testimony, and when they were through, we took a little testimony in rebuttal, which completed the preparation of the case upon both sides, and it stood for hearing. We had the case certified—I believe that is the term that is used here—from the equity branch of the supreme court of the District of Columbia to the supreme court *in banc*, where it was heard at the first term. It was argued upon the part of the complainants by Mr. Blake and myself, and on part of the defendants by Mr. Merriman, who was the solicitor of record in the case, and Mr. Davidge.

While the case was pending in the supreme court of the District of Columbia, and I think shortly after all the testimony had been completed, I said to Mr. Merriman, the solicitor for the defendants, that we had understood from the beginning of the case that both sides were anxious to have an immediate determination of the case, and suggest-

ed to him that after the case had been decided in the supreme court of the District of Columbia the party in whose favor that decision might be would very probably not care to have the final determination of the case in the Supreme Court of the United States expedited, and therefore I suggested that before the case came on for hearing, and when we both expected to gain it and neither of us knew who would gain it, we had better enter into a stipulation by which it should be agreed that whoever lost the case in the supreme court of the District of Columbia should take an appeal to the first term of the Supreme Court of the United States, and that the case should then be submitted upon printed briefs.

I may state in connection with that, that that proposition was made after considerable deliberation and consultation between Mr. Blake and myself, and some of the other complainants in the case—I think with Mr. Cox and Mr. Peck, and probably with Col. Phillip. It was regarded as hazardous on our part to submit the case from printed briefs, as there were advantages in oral argument of such a case, and I felt that the embarrassment on our side was greater than it would be on that of the defendants, as it devolved upon us to make out our case. Judge Merriman took my proposition under consideration, and told me that he would advise with his clients about it, and he afterwards informed me that he was prepared to enter into that stipulation. My recollection is—I cannot be certain about it—that I wrote the stipulation, and that Mr. James A. Maloney copied it; I see that it is in his hand-writing. After it was copied, my recollection is that it was signed by Judge Merriman, and that I took it to Mr. Cox and he signed it, and I then left it with him to be taken care of and file when it might be found necessary.

After the decision of the case by the supreme court of the District of Columbia, it seemed to have turned out as I suspected it might, that the defendants, having obtained a decree in that court in their favor, began to manifest an unwillingness to carry out the stipulation. I consulted with Mr. Cox about the matter, and he entertained and expressed doubts as to whether the Supreme Court would enforce such a stipulation. There was at that time no reported decision upon the subject, but the same question

came up at the last term of the Supreme Court, and the court then decided that a party having entered into a stipulation to submit must abide by it. This decision was rendered while our case was pending in the Supreme Court, and I heard the decision announced one day when I was waiting in the court expecting that our case would be decided. This was after our case had been submitted. In deference to the views of Mr. Cox, I consented that he should agree with Mr. Herr, who had been proposing some arrangement in the matter, that if we should agree to take a sum certain in gross, to be paid contingently upon the result of the decision of the case by the Supreme Court, and agreed with him that he should make the offer to accept the sum of $2,500. I did not understand that there was anything improper in such an arrangement. We had never entertained any expectation of any very large recovery.

(Mr. Harding renews his objection to the statement of opinions of counsel.)

And I had so stated in open court on the argument of the case below. In the condition of the docket of the Supreme Court, and at what I understood to be the rate at which the cases on the docket were disposed of, I supposed that that case would not be decided until nearly the expiration of our patent, and possibly not until after the patent had expired, and therefore I set no value upon the right of injunction in that particular case.

My recollection is that I was absent from the city, and certainly I was not present at any of the interviews between Mr. Cox and Mr. Herr. After it was concluded, I heard of it, I think, from Mr. Cox. The agreement having been confirmed that they should submit their case upon printed briefs, I was anxious to have the case submitted at as early a day as possible.

During the time which intervened between the commencement of the session of the court and the presidential election there was great delay in the presentation of the cases in court. I know several times that the court met and called over the ten cases allotted for that day, and adjourned, I think, without any case being ready for argument.

Finally, according to my recollection, the court ad-

journed over, a week or such a matter before the presidential election, until after the election. I felt confident that if I could get the case submitted on printed briefs while the court had but little or no employment we could get an early decision in the case, and I apprehended that if it went over until after the election, and the business of the court should be prosecuted with its ordinary rapidity, the precedence would be given to cases that had been orally argued, and our case submitted on printed briefs might be indefinitely postponed. I represented this, I think, to Mr. Cady, who, I understood, had been retained to argue the case for the defendants, and probably also to Judge Merriman, and, I think, to Mr. Herr. I expressed my anxiety that no unnecessary delay should occur in the preparation of their case, in order that they might obtain the advantage of presenting it to the court at a time when the court was less pressed than usual.

I think, as Mr. Cox suggests, that Mr. Herr, after the case had been decided, met me on the street, and referred to the matter of costs in the case, and urged upon me that we should let them off from the payment of costs. I told him if there was any understanding of that sort it must be with Mr. Cox, for I certainly had no such understanding myself, and my recollection is that he told me that there was no agreement between him and Mr. Cox on the subject. I never consented to release him, and never understood that we were under any obligations to release him.

(Mr. Harding specially objects to the last clause of Mr. Mason's statement as to the agreement made between Mr. Cox and Mr. Herr, at which he was not present.)

I may state further that during the progress of this suit Mr. Herr, who seemed to be extremely anxious to get rid of the matter, repeatedly, on meeting me, brought up the subject of pooling our patents. That was a matter that had been discussed among the representatives of a number of Middlings Purifier patents, resident in Washington—I mean the attorneys for the patentees—long before we brought suit against these defendants. At that meeting I expressed my conviction that it was to the interest of the parties owning the Middlings Purifiers to combine them, but nothing came of the negotiation, the interests being ap-

parently irreconcileable, and everybody thinking his patent worth more than all the others.

Mr. Herr frequently reverted to that matter pending the prosecution of our suit, and I also told him that it was a subject that I could not entertain. On one occasion, I think in the summer of 1876, Mr. Herr, James S. Welch, Mr. Rosia W. Welch, and one of the other brothers, I do not remember which one of them, I think, though, it was James, came to my residence, where I was confined with a lame foot, and earnestly pressed upon me the proposition to pool our patents. I told them it was utterly impossible; that I could not negotiate with them upon the subject; that it would make our suit fraudulent and collusive; that professionally I could not have anything to do with it, and that besides all that, it would be a very foolish thing to undertake, for it would defeat the very purpose of our suit. Some of them, I think it was one of the younger Welches, was somewhat excited and offended at my rejection of their proposition, and threatened that they would destroy our patents, and I told them to do whatever they could; that if they could beat our patents I wanted them to do it. I think I never had any other conversation on that subject afterwards except with Mr. Herr, who referred to the matter frequently, as I met him more frequently than any of the rest of them, for he had a great deal of business which brought him up into the neighborhood of my office. I used to meet him occasionally in Judge Merriman's office and sometimes on the street, and sometimes he came into my office, but I always told him the same thing, that we would do nothing to make this suit collusive, and I advised my associates to be exceedingly careful in their conversation with any of the defendants, to see that they made no promises or agreements that could be construed into collusion in the case, and some of them I took into my office and read from decisions of the Supreme Court of the United States upon that subject, and explained to them the extreme hazard and danger of it, and cautioned them again and again that if they were approached on this subject to have nothing whatever to say about it; and to my knowledge and belief no arrangement whatever was ever made between the plaintiffs and the defendants touching this matter now on inquiry, except the agreement

made between Mr. Cox and Mr. Herr, as to which they have both testified. I certainly have never done or said anything with such a view, or that could be construed into any arrangement whatever with regard to this case other than the agreement that I have set forth as to the stipulation now on file in the Supreme Court of the United States.

My recollection is that when the record was made out Mr. Cox brought it up and filed it in the Supreme Court of the United States, together with the stipulation, and that he entered his appearance as attorney of record in the case.

I never got the impression from anything that Mr. Herr, or any of the other parties in interest in that suit among the defendants said to me, that they had ever reached any conclusion that their patents were not valuable. In all my conversations with Mr. Herr, which have run from time to time from the very beginning of these proceedings, and before that, in fact, down to within a few months past, he has always spoken of the Welch patent as very important and valuable, and I have always so regarded it myself, believing it to be among the most valuable of the patents that have been issued upon machines for purifying middlings. I mean machines that have been patented since Cochrane's, within the last few years, and have gone into general use in the mills throughout the United States. I had been informed that they had made one sale of a license for the sum of $10,000.

(Mr. Judson objects to the statement of witness as to what he has been informed.)

And also that they had made other sales, the amount of which I never did hear until stated yesterday by one of the Welches, on his examination. There was nothing that these defendants or Mr. James S. Welch or Mr. Herr ever said to me that raised in my mind any impression that they had any other purpose than to gain their case if they could. On the contrary, they always expressed great confidence in being able to gain it.

After the case was decided by the Supreme Court of the United States we thought of applying to the court for a mandate.

The case had attracted a great deal of attention among

parties interested in milling, and a very large number of patent practitioners in the city of Washington were attorneys for different patentees of Middlings Purifiers, and a great many of them spoke to me about the case, and I soon heard that there were charges in circulation that the case of Cochrane *et al. vs.* Deener *et al.* had been fraudulent and collusive. I cannot now recall to mind the names of any persons who mentioned those reports to me. I am under the impression, however, that it was not long after the decision was made until the charge to that effect was published in some of the milling papers; and I think, also, that Mr. Hollingsworth, of New York city, an expert retained by us, told me that he had heard it reported there. According to the best of my recollection, his statement was that some miller, whose name he either did not mention or I do not recollect, had told him that he had written over here to Mr. Shoemaker—who was subpœnaed as a witness in this case, and was in attendance yesterday—to inquire about the case, and that he had written back that the case was fraudulent. I think I communicated that to Mr. Cox, and I think it is probable that that is what Mr. Cox had in his mind when he said that it had come here from abroad.

(Mr. Harding objects to this statement.)

I was making the statement for the benefit of Mr. Harding, I supposed, and therefore I will not say anything about it. I believe that is all I have to state.

Cross-examination.

By Mr. HARDING:

Cross-Q. 4. When you commenced the suit of Cochrane *et al. vs.* Deener *et al.* in the supreme court of the District of Columbia, and asked by your bill for an injunction and an account, was it you intention, in case you got a decree for an injunction and an account in that court, to release the defendants from the injunction and the account in such event, and did you so communicate to the defendants, and if so, upon what terms?

A. I do not remember that there was anything in my mind on this subject at the time; certainly I made no such suggestions to the defendants or any of them, or to their

made between Mr. Cox and Mr. Herr, as to which they have both testified. I certainly have never done or said anything with such a view, or that could be construed into any arrangement whatever with regard to this case other than the agreement that I have set forth as to the stipulation now on file in the Supreme Court of the United States.

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(Mr. Harding objects to this statement.)

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A. I do not remember that there was anything in my mind on this subject at the time; certainly I made no such suggestions to the defendants or any of them, or to their

counsel or agents. I did say this, I think, some time after the suit was commenced: That if the case was expedited without being unnecessarily delayed, I would deal fairly or liberally—I do not remember what the word was—with the defendants in case we should recover against them; but I made no express promise, nor did I ever state or intimate anything which would show what I regarded as dealing fairly or liberally with them. It was a general offer to the effect that if they would let the case run on without wasting time in the matter, I should deal kindly in the matter with them. But I expressly stated when I said anything to them on the subject, that I did not want anything that I said to affect the character of their defence; that my object was to get a decisive case, and whatever belonged to the case I hoped they would bring into it; and I suggested to Judge Merriman, after his answer was filed, that he had better set up in his answer certain patents, and we entered into a stipulation that they should be regarded as in the case, as though set up in the answer.

Cross-Q. 5. Why did you consider the proposition, which you made of your own motion to Mr. Merriman, and which is contained in the agreement signed by Mr. Merriman and Mr. Cox, as hazardous?

A. I felt about it just as I heard you express yourself in the argument of a case before the circuit court of the United States, at S. Louis: that it was preferable to argue patent cases orally before the court, as admitting better opportunity for inquiry upon the part of the court, and for coming to an understanding in the case, than was possible by a printed argument, where one could not tell whether what he was saying was so expressed as to convey the impression that it was intended to convey to the court.

Cross-Q. 6. Do you know when the duplicate copies of the transcript were deposited in the Supreme Court and how they were gotten up?

A. We had had a large number of extra copies of the record in the court below printed, and I had a number of them in my possession; the record that was sent to the Supreme Court from the court below, according to my recollection, was a copy of our printed record with interlineations of the dates of filing papers, and probably some

verbal corrections, to which the clerk appended such entries as had been made in the court below and entered upon its journals, and also an amended answer, which was introduced into the case during the hearing, on motion of Mr. Davidge, and which was prepared by him; that was the only matter that was added to the record in manuscript, except corrections that were made, as I have stated, on the face of the printed record.

I inquired of the deputy clerk, I think Mr. McKenney, as to how long it would probably take to get the record printed for the Supreme Court of the United States, and I do not remember how long he said, but I know it was a considerable time, and I was very anxious to get the case submitted as early in the term as possible. I proposed to him, therefore, that I would furnish printed copies of the record, which would cover all the record that had come from the court below, except the manuscript matter added thereto, which was afterward printed, pursuant to this suggestion of mine, and found on the last two pages of the record of the Supreme Court, and those two pages, it will be observed, are in a different type from the rest of the record. He said that he did not think there was any objection to that arrangement, and consented to it, and it was done accordingly. I furnished the number of copies which were required by the rules, less one, probably, to which we ourselves would be entitled, I not being able to make up quite the number. I think the rule required seventeen copies, and I furnished sixteen.

Mr. HARDING The rule requires twenty copies.

The WITNESS. Then I furnished what he said would answer. At any rate, I furnished the number of copies that Mr. McKenney stated was absolutely necessary to be furnished to comply with the purpose of the rule. There was no other object in it in the world than the saving of time, as I agreed, of course, that the clerk's fees should not be affected by it. He had the copies to revise and correct, which he did upon such copies of the record as I have seen.

Cross-Q. 7. My question was, when did you deposit the duplicate copies of the record in the court?

A. Very shortly after the appeal. The appeal was on the 5th of October, and I cannot fix the date of depositing

the copies of the record, but it was very shortly after that, because the case was submitted in November, and according to my recollection, when it was submitted, the printed additions and the cover, which had been substituted for the cover to the record below, had been printed and were here in court.

Cross-Q. 8. You cannot fix the time?

A. I cannot fix the time. It must have been in the month of October, and I think very soon after the 5th; my impression is that it must have been within a very few days after that, probably before the meeting of the court.

Cross-Q. 9. Did you furnish a copy of the record to the appellees, or did they get it from the court; and if you furnished it, to whom did you furnish it?

A. I was under the impression that the copies were furnished from the clerk's office, but under the suggestion that there were only sixteen copies filed, it is brought to my recollection that I made an arrangement with Judge Merriman, who had all the records in the court below, which was all of the record except the mere formal entries in the court below, to agree to this arrangement and make his argument from the original record, as he did. I know certainly that I furnished only such copies as Mr. McKenney said were absolutely necessary to be issued to the court, to file in the library, and to keep the copy that is required to be retained in the clerk's office.

Cross-Q. 10. You stated, in an affidavit filed by you in the circuit court of the United States for the eastern district of Missouri, that during the absence of *of* affiant [yourself] from this city, as you have been informed and believe, Mr. Cox arranged with Mr. Herr that, if the case should be submitted on printed briefs and decided in favor of the complainants, defendants should not be enjoined, which was what they principally feared; * * * how did you learn this fact?

A. Whatever I learned about it, I learned in consultation with Mr. Cox. The statement included in the words "which the defendants principally feared," was probably inferential, and was certainly carelessly made, for I do not recollect that any of the defendants ever told me that they principally feared an injunction, and I do not recollect that

Mr. Cox ever said anything to me on the subject of the injunction. It was an inference in my mind from the fact of the argument which we had made, and which, as I understood, was to cover the license to use it in the future; and that, of course, would preclude the idea of an injunction.

Cross-Q. 11. You stated in your affidavit that you were informed and believed that, upon the refusal of Mr. Davidge to argue the case, Mr. Herr applied to the president of the Metropolitan Middlings Purifier Company about the employment of an attorney; when and how did you get that knowledge?

A. I cannot state that with absolute certainty; my impression, however, is that Mr. Herr told me that he had gone to Mr. Bramhall, who was the president of the Metropolitan Middlings Purifier Company, and asked him whom, of all the lawyers he knew, he would recommend him to employ, and that he told him.

Cross-Q. 12. I did not ask you what he told you, but I merely asked you when and from whom you got the information on which you based the statement in your affidavit quoted above?

A. My impression is that it was Mr. Herr. It was certainly either Mr. Herr or Colonel Bramhall.

Cross-Q. 13. He is an officer of the Metropolitan Middlings Purifier Company?

A. Yes, sir; the president of that company. I think it was Mr. Herr.

Cross-Q. 14. When and on what occasion was it that Judge Merriman told you that he had refused to argue any other question than the one of jurisdiction unless the appellees would increase his compensation, as stated by you in your affidavit?

A. I cannot fix the time. It was during the time when the arguments were in preparation, or immediately after they were filed. There is nothing that enables me to fix the date. I remember the statement, but not the time, nor any of the circumstances connected with it.

Cross-Q. 15. You cannot state how he came to make this statement to you, can you?

A. No; not at all. I have no recollection about it. I was on terms of friendship with Judge Merriman, as I am

with other attorneys—no more and no less. We mentioned matters belonging to the case frequently in our conversations, when we happened to meet.

Cross-Q. 16. The agreement or stipulation as to the argument of the case on printed briefs, which has been produced here, as signed by Mr. Merriman and Mr. Cox, April 8th, 1876, was never filed in the court below, was it?

A. No, sir. I did not understand that it belonged to the court below. It was filed in the Supreme Court, where it was intended to take effect.

Cross-Q. 17. If you drew that paper with that intention, why did you entitle as of the court below, with the term number?

A. I do not remember that I had any intention about it. I entitled it in the court below because the case was there; I gave it to Mr. Cox, and I do not remember that I gave him any instructions about it; I may say that I was under the impression until the paper was produced that it had been filed in the court below, and I think I told some of the counsel in connection with one of these cases that that was the case, but, if I did, I was mistaken; by "one of these cases" I mean one of the cases instituted since the decision below, and in which Mr. Harding is attorney; I think I said so at Saint Paul, Minn., either for the counsel for the defendants or in court, but, wherever I said it, it was a mistake; my mind being called to the subject, I recollect that I was served with a notice to produce the paper while at Saint Paul, and that I stated in court that I did not have it in my possession, but that it had been filed in the supreme court of the District of Columbia after the record had been printed; but I now recollect that, instead of filing it, I took it up to Mr. Cox's office and gave it to him, and I do not think I ever saw it from that time until yesterday.

Cross-Q. 18. How long were you absent from this city about the time of the agreement between Mr. Cox and Mr Herr, and how long was said agreement under advisement before consummation?

A. I cannot recollect; it is my impression that I was absent, but I am not absolutely certain of that, and I think I so stated in my examination-in-chief. The matter was under discussion, I should think, according to the best of

my recollection, a few weeks, but I cannot fix the time. I know Mr. Cox and I had several conversations on the subject, and I think some of the other members of the company, probably.

Cross-Q. 19. Did you file all the arguments of the appellees as well as of the appellants in the Supreme Court of the United States on the 6th of November?

A. My recollection on the subject is not entirely distinct, but my impression is that one of the counsel came up with me and we filed our arguments at the same time.

Cross-Q. 20. How long before that time had you seen the arguments of Mr. Merriman and Mr. Cady for the appellees?

A. My recollection about the time is not distinct; my impression is that I saw them a few days before they were filed, and the last argument that was finished was the argument of my colleague, Mr. Blake; and to the best of my recollection, when I received that, I called upon the other attorneys and told them that our arguments were now ready, and that we came together to the clerk's office and filed them.

Cross-Q. 21. Was any agreement or stipulation had between you and any one else as to the time these respective arguments were to be filed?

A. No, sir; not that I recollect of; I only know that I was anxious to have them filed as soon as possible, and had to hurry my own colleague to get him ready with his argument.

Cross-Q. 22. Did you serve a copy of your argument upon Mr. Cady and Mr. Merriman?

A. I furnished them copies of my argument as soon as it was printed. It was some weeks, according to my best recollection, before they were filed, and I know that it was before Mr. Cady had finished his argument, for he told me that he had not. I had made an argument that was substantially the same as the argument that was made in the Supreme Court, which had been printed.

(Mr. Harding objects to any statement except as to when witness served the copy of his argument, made by him in the Supreme Court, upon Mr. Cady and Mr. Merriman.)

(Mr. Mason states that substantially the same argument

was in print from the time of the hearing in the court below.)

Cross-Q. 23. Can you tell me when you served upon Mr. Cady or Mr. Merriman your argument or brief in the Supreme Court of the United States?

A. I think I have just answered that I could not, but that it was done as soon as I could get it printed, and a few weeks before their arguments were filed.

Cross-Q. 24. Do you know that it was two weeks?

A. My impression would be that it was two or three weeks.

Cross-Q. 25. Are you willing to say positively that it was two weeks before the argument was filed?

A. I am not willing to say positively anything about it, for I stated that my recollection is not at all distinct; I know that I gave it to them as soon as I got it printed; *that* I do recollect, but what the date was I have no recollection.

Cross-Q. 26. You would not like to state positively that it was as much as two weeks?

A. I will state that according to my impression it was more than that, but I will not state positively when it was, for I do not know.

Cross-Q. 27. Are you willing to state positively that you saw Mr. Merryman's or Mr. Cady's argument before the arguments were filed on the 6th of November, 1876?

A. I have no recollection as to Mr. Merriman's; I have a not very distinct impression that I saw Mr. Cady's argument long enough before to enable me to write to Mr. Blake to conclude his argument and forward it. As he was to close the case, he kept his argument back for the purpose of ascertaining what it was he was to reply to.

Cross-Q. 28. Have you no other recollection of Mr. Cady's argument than the fact of your writing to Mr. Blake to finish his argument and send it on?

A. No, and I am not certain even as to that; it is a mere impression, and may not be correct.

Cross-Q. 29. How long before the 6th of November was it that you received Mr. Blake's argument?

A. My impression is that I called upon them immediately upon receiving his argument, and that we came together and filed our arguments.

The matter was one that I did not regard as important at the time, and did not fix it in my memory, and I have a very shadowy recollection of the whole thing. I have never thought of it from that day to this, that I know of.

In referring to my suggestion that sundry patents should be set up in the answer, I do not mean to be understood that counsel were not aware of the existence of those patents, for it will appear by reference to the stipulation that they had already put them in evidence. My suggestion was that they must be set up in the answer, and as they were in evidence I wanted the record to show that they were in the case.

R. MASON.

In reply to an inquiry from Mr. Harding, Mr. Mason states further:

My interest in the Cochrane patent is one-third of two-thirds, (about 22 per cent.,) and that Mr. Cox's interest in the same is one-fifteenth, ($\frac{1}{15}$.)

Mr. Renwick's fees were $50 a day and expenses while testifying. Mr. Blake's fee for his argument in the Supreme Court was $1,000. Neither Mr. Cox nor myself were paid any fees for conducting the case, I having said to the five Washington parties when they purchased a one-third interest in the patent that I would not make any charge for any professional services they might call on me to render, other than for expenses.

Mr. Mason desires to state further that he and Mr. Blake argued the case independently, and that he never saw Mr. Blake's argument until it was sent to him in print. I furnished him a copy of my argument immediately after it was printed, which I find, from the printer's account, was on the 5th of October, 1876.

Mr. Mason also desires to call attention to the fact that in furnishing a copy of his arguments to the defendants, as he has stated he did, it was simply as an act of professional courtesy, the rule of the court under which we were proceeding not requiring it.

Mr. Blake argued the case in the court below, and was retained in the case before it commenced, and consulted during its progress, and was paid $100 a day for his ser-

vices, except when engaged in the argument, when he made a charge in gross.

R. MASON.

CHARLES F. PECK, a witness in opposition to the motion, having been duly sworn, testified as follows:

By Mr. MASON:

Q. 1. State your name, age, residence, and occupation.

A. My name is Charles F. Peck; my age is forty-three years, and my residence is Georgetown, D. C.; I am an attorney-at-law.

Q. 2. You are one of the complainants in this case?

A. Yes, sir.

Q. 3. Did you have a conversation with Mr. A. H. Herr since the commencement of these motion proceedings with regard to the value of his patent interest which was affected by the decision in the case of Cochrane *et al. vs.* Deener *et al.*, and if so, what was said?

A. I had a conversation with Mr. Herr on that subject about the time the motion papers in this case were lodged with the clerk before the meeting of the Supreme Court. I happened to see the motion on file in the clerk's office and read it, and a few moments afterwards, on the way to my office, I met Mr. Herr on the street, and told him a motion had been filed.

(Mr. Harding objects to any testimony to impeach Mr. Herr, inasmuch as no such matter was called to Mr. Herr's attention while he was upon the stand.)

(Mr. Mason states that the information only came to his knowledge within a few hours past, to-day, and that the object of the inquiry is not to impeach or contradict Mr. Herr.)

(Mr. Harding states that Mr. Herr himself has been present this morning, producing exhibits and papers within the last two hours; and that proof of the statements of Mr. Herr can only be evidence upon the ground of impeaching his testimony.)

(Mr. Mason states that his intention was to call Mr. Herr's attention to the proof that he now proposes to give,

but that Mr. Herr had left before he knew that he was going.)

(Mr. Harding renews his objection on the ground that the course pursued by Mr. Mason is not proper.)

A. I asked Mr. Herr if the value of his patents which were affected by the decision of the Supreme Court was not considerable; he said it was. I asked him how valuable he thought they were; he said that was extremely difficult to answer; it was always difficult to fix any definite value to a patent. I then asked him what he would have considered the value of his patent if he had gained the suit in the Supreme Court, and the decree there had been in his favor; he said that would be worth a good deal of money. I asked him what he meant by a "good deal of money;" "Well," he said, "that was indifinite;" it was difficult to answer. Then I said, "Do you mean, say from twenty to fifty thousand dollars that you would have made out of it if you had got the decree?" He replied: "We thought of more than that." Then, said I, "Do you mean from one hundred thousand dollars to two hundred thousand dollars, say?" He said that was a great deal of money; he would not like to put it at as high a figure as that. That was about all the conversation we had upon that particular subject.

(Mr. Harding objects to all the testimony of this witness, and, without waiving any objection, proceeds to cross-examine him.)

Cross-examination.

By Mr. Harding:

Cross-Q. 4. What was the date?

A. I have no means of fixing the precise date, but it was between the time the motion was lodged with the clerk and the time of the meeting of the court, and it was the first knowledge I had of the filing of any such motion; it must have been several weeks before the court met.

Cross-Q. 5. It was not earlier than September, 1877, was it?

A. If you can tell me when the motion was lodged in the clerk's office, I could answer more satisfactorily.

Cross-Q. 6. Was it earlier than August, 1877?
A. I should think it was later than August.

C. F. PECK.

(Mr. Mason states that he concludes his case, subject to recall of any of the witnesses that may be found to be necessary at the next meeting.)

Thereupon, Mr. Harding states that he proposes to prove that the suits instituted in Rochester by Mr. Herr and others, on the Wheeler and Reynolds patents, in reference to which Mr. Herr testified, were dismissed in June, 1876; and that the suit instituted in St. Louis, referred to by Mr. Herr, under the same patents, against the firm of E. O. Stannard and Company, was dismissed in September, 1876; this by production of certified copies of the docket entries, if Mr. Mason insists upon such production, but states that the same involves delay.

Mr. Mason replies that, reserving all exceptions as to relevancy, he is willing that the date may be established by any statements that counsel in this case will make upon their responsibility as being, to the best of their knowledge and belief, the true date.

Mr. Harding states that he is reliably informed, upon the statements of his associates, one resident at St. Louis and the other at Rochester, that such is the case.

Mr. Mason says that this is sufficient.

Mr. Harding states that he has caused inquiry to be made for Mr. Merriman at his office and residence, in this city, and sent a subpœna to his house and to his office by an officer, six days ago, but has been unable to secure a personal service upon him; that Mr. Maloney, a witness heretofore examined, states that Mr. Merriman is now engaged professionally at Norwich, Conn., and that he has communicated the fact to Mr. Merriman, in Connecticut; and Mr. Harding states further, that he hopes to have Mr. Merriman in attendance on Saturday next, and requests an adjournment to that time.

Adjourned to ten o'clock A. M., Saturday, December 1, 1877.

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10 o'clock A. M., SATURDAY, *December* 1, 1877.

Met pursuant to adjourment.

proposition did you make to Mr. Cox, when he refused, for the reason above stated, to pool the patents?)

The WITNESS. I was going to give you the grounds.

Q. 151. I do not ask you for the grounds; I ask you what proposition did you make?

A. I wanted to know what they were going to charge us.

Mr. MASON. Go on and answer in your own way.

A. That was the basis upon which—

Mr. MASON. I understood him to say—

(Mr. Harding again objects to what Mr. Mason said in his speech in the supreme court of the District of Columbia, in reply to the question as to what the witness said to Mr. Cox at the conversation referred to.)

(Mr. Mason also insists upon his part that the witness shall answer the question in his own way without further interruption.)

The WITNESS. I merely mentioned this as a basis.

By Mr. HARDING:

Q. 142. What did you say to Mr. Cox when he made the remark about the Supreme Court and the tainting?

A. I asked him what he was going to charge me.

(Mr. Harding again objects, and Mr. Mason again insists that the witness be permitted to answer.)

A. I asked Mr. Cox what he was going to charge if the case should go against us—Deener, Cissel & Welch.

Q. 143. What did Mr. Cox say?

A. He stated that his object was not to be excessive in his charge; he thought $2,500; I talked the matter over with him some time, and he finally agreed to take $1,000 for the two mills—the Pioneer Mill, belonging to myself, and the Columbia Mill, belonging to Mr. Welch; that is to say, $500 for each mill, $250 cash and $250 in twelve months, and we so settled after the termination of the decision.

Q. 144. Did this settlement include a release for all claims for past damages and profits against those two mills, as well as a license extending to the end of the patents?

A. Yes, sir.

Q. 145. When this suit was originally instituted, was anything said about the amount of damages claimed by the plaintiffs?

A. I do not remember anything except what the bill called for.

Q. 146. Did you make any inquiry to ascertain what the probable amount of damages claimed was?

A. No, sir; I do not remember that I ever did.

Q. 147. Do you know of its being done by any one?

A. I do not.

Q. 148. You had this conversation with Mr. Cox; did you report the agreement you had made to the defendants in the suit?

A. Yes, sir; to Mr. James S. Welch, the proprietor of Columbia Mills.

Q. 149. To no one else?

A. I made that communication through Mr. Deener.

Q. 150. Did you communicate this agreement of settlement to Mr. Deener, one of the defendants?

A. Yes, sir; to Mr. Deener to communicate to Mr. Welch, and he did so, and Mr. Welch gave his consent; in confirmation of that, he gave $250 in cash and his note for the residue.

Q. 151. Was any written paper signed by any of the parties at the time?

A. I do not remember that there was.

Q. 152. Was no one present but you and Mr. Cox at the time this agreement was made?

A. No one else was present. Do you mean whether Mr. Cox signed the agreement?

Q. 153. Yes.

A. No, sir.

Q. 154. Did Mr. Walter S. Cox sign any paper setting forth this agreement?

A. He peremptorily refused to do so.

Q. 155. Did you ask him to do it?

A. I did.

Q. 156. Why did you want it?

A. For the simple reason that I wanted to be fortified in the event of his death, or something of that sort.

Q. 157. Why did he peremptorily refuse to sign that paper setting forth the agreement.

A. I do not remember that he assigned any particular reason, but he refused.

Q. 158. Try to remember.

A. I do not think he gave any particular reason.

Q. 159. If he gave any reason in general?

A. I inferred—if you wish me to state that—

(Mr. Mason objects to witness stating inferences.)

Mr. HARDING. Go on and state what you understood to be his reason.

A. I inferred that his reasons were that he wanted to do nothing that would in any way taint the case.

Q. 160. When did you pay the $250 cash, and give the note?

A. I have got a receipt at home. I will bring that.

Q. 161. Please bring that receipt; have you with you now any written papers, agreements, or memoranda touching this matter?

A. I have two that I have brought with me, which I thought might be called for. They are copies of papers filed among the papers in court, I suppose.

Q. 162. What are these papers?

A. I was asked by Mr. Cox to give my impressions as what transpired in regard to the case, and they are the affidavits that I made. One is dated, I think, the 3d of April, 1877, and the other the 2d of October.

Q. 163. Do you know why you gave the affidavit of the 2d of April?

A. I set forth in the opening of those papers, I think, that certain rumors or insinuations had gone forth to the effect that there was collusion.

Q. 164. Had you heard those rumors then?

A. Oh, yes. I had heard a great many rumors, and also that papers reflecting upon me had been gotten up, and I felt a desire to put myself right on the record.

Q. 165. Was it before or after the decision in the Supreme Court of the United States on appeal that you gave the $250 cash and $250 note?

A. I stated that it was after the decision.

Q. 166. Was it not very soon after?

A. I cannot tell you. I will bring you a receipt showing the exact date.

Q. 167. Did you not call upon Mr. Cox and demand some further paper then, and offer him the money?

A. I am not sure. I think I have got a further paper. May be that is embodied in the receipt. I am not sure as

to that. It is a guarantee to me, and I think it is embodied in the receipt, if I remember.

Q. 168. Guaranteeing to you what?

A. The use of the machinery without any further charge.

Q. 169. Will you please produce that receipt?

A. I have promised to do so.

Q. 170. Did Mr. Welch get a similar receipt or agreement, or did you get one for him?

A. He got a similar one to mine.

Q. 171. Did he call with you on Mr. Cox?

A. No, sir.

Q. 172. Did you not call and ask for a paper of this kind of Mr. Cox, and tender to him the money?

A. It happened about that time.

Q. 173. Did you not call upon him and ask him to give you the paper, and offer to give him the money and note?

A. I called upon him then when I paid the money.

Q. 174. And offered the money and asked for the paper, did you not?

A. I do not know whether the paper was given at the same time. I am not prepared to say.

Q. 175. Did you not ask for a paper when you paid the money?

A. Of course, I wanted security.

Q. 176. Why did you want security?

A. Why do persons take papers, agreements, and receipts?

Q. 177. Did you not think it important that you should have some written documents, signed by Mr. Cox, showing this license for the future and release for the past?

A. Yes, sir.

Q. 178. Did he make any objection to giving it to you?

A. I do not think that he did. I do not remember it.

Q. 179. He gave it willingly, did he not?

A. Well, I am not prepared to say about that. He gave it to me after my asking.

Q. 180. After you had reported this settlement to the defendants, was anything said about the employment of counsel?

A. No, sir; not that I remember.

Q. 181. Was anything said about sending a written paper to Mr. Davidge to sign, agreeing not to argue the case?

A. No, sir; I do not remember anything of that kind.

Q. 182. Was any paper prepared to be sent to Mr. Davidge?

A. I do not remember any.

Q. 183. Was any paper prepared and signed about employing Mr. Davidge to argue the case?

A. Yes, sir. I think there was a paper signed, requesting—I am not sure as to that—I may have such a paper.

Q. 184. Was there not such a paper prepared, whether you have it or not, directing you not to employ Mr. Davidge?

A. Not to employ him?

Q. 185. Or not to permit him to argue the case orally?

A. No, sir. I do not remember it. I have no recollection whatever of any such paper.

Q. 186. Was there not something said about Mr. Davidge not arguing the case orally?

A. There was a good deal of talk about it.

Q. 187. What was said?

A. I cannot remember a thousandth part of it. I remember that we decided not to employ him, because we felt that if not legally, certainly we were morally and in honor bound to carry out the stipulation. That is the ground I took from beginning to end.

Q. 188. Was that the ground you took when you went to Mr. Cox and asked him to pool the patents?

A. Well, I do not remember; such questions did not come, I reckon, at that time; I do not remember any conversation in regard to it.

Q. 189. Do you think you told him that at the time you proposed to pool the patent?

A. No, sir; I do not think so.

Q. 190. Do you think you told him that at the time you asked him what he would charge you?

A. No, sir; I do not have any recollection of it.

Q. 191. Do you not think at some time or other you told him that you were not going to have the case argued on printed argument?

A. No, sir; I said that some of the parties were opposed to submitting it on printed arguments, and he said that he was determined to enforce the agreement, as I have already stated.

Q. 192. Who were the parties that were unwilling to have it argued on printed arguments?

A. The young Welch's.

Q. 193. Give me their full names?

A. There are three of them now living.

Q. 194. Were their names James H., Rosia W., and E. P. Welch?

A. Yes, sir; and E. P. Welch is the man I had the most conversation with, because we were nearer each other.

Q. 195. What did E. P. Welch say to you?

A. He thought it was their duty to carry out that agreement after I had presented the case properly to him, as I thought; his advice and opinion were that we should carry it out.

Q. 196. That is to say after you presented the case properly to him?

A. I say after I presented the case, in my view, properly to him.

Q. 197. After Mr. Cox told you that the court would enforce this agreement——

A. He told me that he would endeavor to have this agreement enforced.

Q. 198. After Mr. Walter S. Cox told you that he would endeavor to enforce the agreement, did you tell him that you thought you were morally bound to agree to it?

A. I never told him so to my recollection.

Q. 199. Did you give him to understand that personally you wanted to enforce it?

A. No, sir.

Q. 200. Did you give him to understand that the parties in interest, the defendants, were disposed not to agree that it should be argued on printed argument?

A. I told him that.

Q. 201. What was you object in telling him that at the time of this conversation about pooling?

A. Nothing more than just to give him the facts.

Q. 202. At the time of this conversation about pooling the patents, and the time when you made the agreement of settlement when you told him that the parties were unwilling to have the case presented on printed arguments, did you tell him the true sentiment of the parties at that time?

A. I thought so.

Q. 203. Then after you reported the agreement that you had made to the parties, did you, at the same time, or about that period, give your opinion also as to their moral obligation to submit it on a printed brief?

A. I contended that we had gone into that matter. And let me here state that I did not approve of that stipulation in the first instance, and that I was the last to give adhesion to it. Then, after it was done, I told him I thought we were morally bound to carry it out, and I would not be accountable for the consequence, at least, if we attempted to have it argued orally and failed.

Q. 204. After you had reported this conversation about the settlement and the arrangements you had made, did the parties agree that the case should be argued on printed argument, and sign a paper to that effect?

A. I think so.

Q. 205. Did you communicate that conclusion to Mr. Cox?

A. I think not; I have no recollection of it.

Q. 206. Was it communicated to Mr. Cox?

A. I am not aware that it was.

Q. 207. At the time of that conversation you gave Mr. Cox to understand that the defendants were disposed to insist on an oral argument?

A. Yes, sir.

Q. 208. When did Mr. Cox become undeceived or better informed on that subject?

A. I do not know. I supposed when he learned from our counsel. I had very few interviews with Mr. Cox.

Q. 209. Did you tell your counsel, after you had had this agreement or written paper about the oral arguments, the conclusion the defendants had come to?

A. Oh, yes.

Q. 210. Whom did you tell?

A. I told Judge Merriman, and re-engaged him.

Q. 211. You re-engaged him then?

A. Yes, sir.

Q. 212. Then it was that you agreed to pay him the $100, was it?

A. Yes, sir; I think so.

Q. 213. In lieu of the $20 weekly stipend?

A. Yes, sir.

Q. 214. Did you say anything to Judge Merriman about the argument?

A. After employing Judge Cady I introduced him to Judge Merriman, and said, "Now, gentlemen, I turn the case over to you; I want it managed in the best way you can."

Q. 215. Was that all you said?

A. I may have said a good deal more, but I can't remember any more. I met them every now and then, and urged them to renewed efforts. I was very particular.

Q. 216. When was it that you employed Mr. Cady, before or after this conversation with Mr. Cox?

A. That I cannot tell you.

Q. 217. Do you not think it was afterwards?

A. I reckon it was.

Q. 218. When you went to Mr. Cady, what did you say to him?

A. I proposed to employ him in this case.

Q. 219. Did you make any arrangement as to terms?

A. I did.

Q. 220. What arrangement did you make?

A. Do you mean compensation?

Q. 221. Yes.

A. It was to give him $250.

Q. 222. Did you tell him that he was to prepare printed arguments?

A. I explained the case to him as well as I could.

Q. 223. How long a time did you spend with him?

A. We had several interviews, perhaps about half an hour at a time.

Q. 224. How many interviews do you suppose you had in all with Mr. Cady?

A. Five or six, perhaps.

Q. 225. How long was each interview, do you suppose?

A. I cannot tell you.

Q. 226. Did you read his argument before it was filed?

A. No, sir.

Q. 227. Did he ask you to read it?

A. No, sir; I do not remember that he did. The reason why, I suppose——

Q. 228. I do not ask you for your reasons; did you read Mr. Merriman's argument?

A. No, sir; it seems that they had not completed their arguments up to the last moment, and, consequently, it was not in a condition for me to read, and I never read either of them until after the trial.

Q. 229. Did you read any portions of their arguments while they were in progress?

A. No, sir.

Q. 230. Did they ask you to?

A. I do not remember that they did.

Q. 231. In the employment of these gentlemen as counsel, did you act as the agent or representative of all the defendants?

A. I did so generally. Mr. James S. Welch, I think, had repeated interviews with Judge Merriman. I do not know that he ever had any talk with Judge Cady.

Q. 232. Do you know how it came that the arguments were not finished until the last moment, so that you could not read them?

A. I cannot give you any reason.

Q. 233. Did you not feel a very great anxiety as to the preparation of these arguments?

A. I did; at the same time I felt that I knew very little about patents or law arguments.

Q. 234. And you did not feel anxiety enough, however, to ask them to tell you how the case was going to be argued, or to read their arguments?

A. No, sir; I did not read their arguments because they were not prepared.

Q. 235. What explanation did you give to Mr. Cady; did you tell him what points were taken in the court below?

A. No, sir; I introduced him to Judge Merriman, and expected the judge—he being familiar with the case as a lawyer—to explain all to him.

Q. 236. Were you, yourself, familiar with this middlings process?

A. I knew some little about the machinery. I occasionally went in the mill, probably once a month or so.

Q. 237. Were you a practical miller?

A. No, sir.

Q. 238. Have you been the owner of mills?

A. I was the owner of the Harper's Ferry mills before the war.

Q. 239. How long have you been the owner of flour mills?

A. Since 1844, I think it was.

Q. 240. Did Mr. Cady ever ask you for any explanation about the number of mills, or anything about the points of the case?

A. He may have asked me, and I proposed to him, if he wanted any models or any drawings, that we would furnish them, and the counsel thought it was not necessary.

Q. 241. That is, Mr. Merriman and Mr. Cady?

A. Yes, sir; they thought it was not necessary.

Q. 242. Did Mr. Merriman knew of this settlement that you had made with Mr. Cox?

A. No, sir; I do not think I ever told him.

Q. 243. Why did you not tell your counsel that you had made a settlement of the case?

A. I saw no necessity for it.

Q. 244. Do you not think it a usual thing to tell your counsel when you have settled a case?

A. No, sir; not of that sort.

Q. 245. Why not of that sort?

A. I looked upon it as a pure business matter, and I am not in the habit of communicating any of my business.

Q. 246. You did not give your counsel in any way to understand anything about this settlement, did you?

A. I have no distinct recollection, but my impression is that I never did.

Q. 247. Neither to Mr. Merriman nor Mr. Cady?

A. I am not prepared to testify positively.

Q. 248. Would you be willing to state positively that your counsel did not know of this settlement at the time they prepared their arguments?

A. Not from me.

Q. 249. Do you not think they already knew it; one or both of them?

A. I do not think they did, yet I cannot say positively.

Q. 250. Why will you not say positively?

A. It is a thing I cannot remember.

Q. 251. Did all of the defendants know of this settlement and its terms at the time it was made?

A. I do not think they did.

Q. 252. What makes you think that they all did not?

A. Well, not through me directly; they may have ob tained the information from Mr. Welch.

Q. 253. What made you say that you think they did not all know of it?

A. I may have stated to them that I communicated with Mr. James S. Welch; we were unfortunately not on very good terms, and I communicated through Mr. Deener, as the more agreeable channel.

Q. 254. Did you tell Mr. Deener your entire conversation with Mr. Cox, or the purport of it?

A. Not entirely; I stated some of the points.

Q. 255. Did you tell him why Mr. Cox would not give you a written paper?

A. I do not think I did; I may have done so.

Q. 256. Do you not think you did do so?

A. I will not say positively.

Q. 257. Did you give him to understand why Mr. Cox refused to pool the patents?

A. I think I did.

Q. 258. Did you say anything to him about telling the young Welch's?

A. I have no recollection whatever; I think he never told.

Q. 259. Do you not think you told him not to tell the young Welch's?

A. I have no recollection of the sort.

Q. 260. Do you not think you told him so?

A. No, sir.

Q. 261. Do you think you told him he might tell the young Welch's?

A. I do not think so. He is a man who can attend to his own business, and I do not think I did.

Q. 262. Why did you not call a meeting of all the defendants, and lay this matter fully before them, like you had done the other matters about which you have stated you conferred about?

A. I told you that the organization had fallen through—I do know that you can call it an organization; I do not want to say anything that will commit me to that; we had not had any meetings for a long while. Mr. Welch and

myself were not on good terms, and a meeting would have been unpleasant.

Q. 263. How many days did you understand Mr. Cady would be employed on his argument, or was employed?

A. Mr. Cady told me that it would take him a long time; he did not indicate any particular time, but he produced an impression on my mind that he thought it would require considerable labor to make the argument.

Q. 264. Was this in estimating the fee that he told you this?

A. He intimated that he ought to have a little more. I told him I thought it was a bargain; that I had his word.

Q. 265. How much did he want for preparing the argument?

A. That is all he named; he named $250 in the first instance.

Q. 266 Did he intimate that he ought to have more?

A. He intimated that he thought he ought to have more.

Q. 267. How much more did he intimate that he thought he ought to have?

A. He did not say.

Q. 268. What did you say to induce him to take less?

A. He had agreed to do it for that?

Q. 269. When was it that he intimated that he ought to have more?

A. Shortly after I had engaged him.

Q. 270. After he began to look into the case?

A. After he began to look into the case.

Q. 271. Why did he say that he thought he ought to have more after he had made a bargain to work for $250?

A. He stated that he looked upon it as a bigger thing; that it required more labor than he expected.

Q. 272. When you called upon him and engaged him for $250, how did you convey to his mind the nature and extent of the case?

A. He told me that he had some idea of the case; that he had given it some attention in the lower court, and I thought he knew, perhaps, more about it than I did.

Q. 273. Did you ever call his attention to any specific points of the argument which struck you in Mr. Davidge's presentation of the case?

A. No, sir. The argument and manner of the argument I left entirely with the two counsel.

Q. 274. Do you know why Mr. Merriman, if he understood all about the case, only filed an argument upon the question of jurisdiction?

A. No, sir.

Q. 275. Did you learn from him that he was only going to file an argument on that point?

A. He told me that he and Mr. Cady had agreed upon the manner of arguing the case. I had left it entirely with them, and made no suggestions whatever as to the manner in which it should be argued.

Q. 276. If Mr. Merriman was familiar with the case, and you turned Mr. Cady over to Mr. Merriman to get his instructions about the case, as you have stated, did you not take interest enough in the case to suggest that Mr. Merriman should also present his views?

A. I thought they knew more about the management of a lawsuit than I did, and I gave it entirely over to them.

Q. 277. Do you not think Mr. Merriman told you that he was not going to argue the merits of the case?

A. He may have done so. I have no distinct recollection of it.

Q. 278. Did not Mr. Merriman ask you for more fees after he began to prepare his argument?

A. I have no recollection of that.

Q. 279. Will you say that he did not?

A. I have no recollection of it.

Q. 280. Are you willing to say that he did not ask you for more?

A. He may have made such a suggestion; but he never asked me directly, to my knowledge.

Q. 281. Was not an application made to you in some way on Mr. Merriman's behalf to increase his fee?

A. I do not recollect. I have his receipt in full for all services, I think, in that case.

Q. 282. Did you not state to Mr. Deener, and through him to James S. Welch, that you thought you had made a very good settlement of this matter with Mr. Cox?

A. I think I told him to say that I made the best settlement that I could.

Q. 283. Did you not think when you got a perpetual

license for these two mills and a release for past damages for the sum of $500 for each mill, that you were getting off well?

A. Well, as I understood it, they could only license me for a few years. I thought it was a fair compensation.

Q. 284. Did you not think you were getting a desirable arrangement?

A. I made the best arrangement I could; I would rather have had it for less.

Q. 285. Have you ever paid any of the costs; and if so, when?

A. The costs of what?

Q. 286. The costs of litigation; court costs?

A. I have paid counsel; I paid the lawyer in St. Louis and also in Rochester.

Q. 287. Have you paid the costs of court in this case in the court below or in the Supreme Court of the United States?

A. No, sir; I do not remember of ever paying any.

Q. 288. Has any bill been sent to you for those costs?

A. No, sir; I have no recollection of it.

Q. 289. You never paid it if it has been sent to you?

A. I know that.

Q. 290. Has nothing been said to you about it that you can recollect?

A. No, sir; I have not the slightest recollection of a word ever having been said to me on the subject.

Q. 291. Was anything said to you about an injunction?

A. I do not remember.

Q. 292. Is this Middlings Purifier process a good thing, as they use it at your mills in Georgetown?

A. We think so.

Q. 293. What effect has it had upon the price of flour per barrel since its introduction?

A. You put a question I cannot answer categorically.

Q. 294. State as nearly as you can what effect it has had on the value of flour?

A. I have taken up an idea that there is not as much in it as many persons represent, but from $1 to $2 a barrel, I have heard some say.

Q. 295. When did you take up this idea that there was not so much in it?

A. All along. I think it depreciated a portion of the flour; what it took from one part it added to the other, or, at least, what it made in one it lost in the other.

Q. 296. What is the production of your mills?

A. 250 for the Pioneer Mills.

Q. 297. And how much for the other?

A. We can make 300, but it is about the same amount as the other, as far as I know.

Q. 298. That is 250 barrels and 300 barrels, respectively, per day; is that so?

A. 250; when we make the high-grade flour we do not make as much; 200 barrels would be the maximum for the high-grade flour.

Q. 299. And how much at the other mill?

A. Probably the same per diem; but when an inferior flour is made we can make more.

Q. 300. From whom did you learn that the value of this process was from $1 to $2 per barrel?

A. I have seen it in print; we never have made it.

Q. 301. Made what?

A. From $1 to $2 a barrel.

Q. 302. Did you never hear any millers say so?

A. I do not remember that I have.

Q. 303. How much per barrel do you think you have made by the use of this process?

A. Well, I have not as exalted an opinion of the patent as many have. I think there is very little made in the end. What is made on one hand by the process on flour is lost to a certain extent on the other.

Q. 304. Why do you suppose people so generally use it?

A. Because the process is so beautiful. It makes such white bread that they will have it.

Q. 305. Why do you suppose millers so generally use it, and it has been so generally introduced?

A. Because the public demand it.

Q. 306. The old-fashioned flour, without the use of this process, would be comparatively unsaleable, would it not?

A. The poorer class have to eat it; there is always a market for it.

Q. 307. Then, is it better, or not, to use the process; what do you think?

A. I think, in the aggregate, that it is a gain.

Q. 308. Why did you introduce it into your mill?

A. Because the public seemed to demand it.

Q. 309. And if you had not introduced it into your mill, you think you would have suffered a disadvantage in public dealings, do you not?

A. I think that is very likely; yet I know some millers that have not yet introduced it, who have a good reputation for their flour; one mill I am interested in at Harper's Ferry; their flour stands high in New York.

Q. 310. Does it stand as high as that which you make?

A. It stands as high as our second grade, and probably a little higher.

Q. 311. What would have been the effect on your business if you had stopped making first grade flour; would it have been an inconvenience, or not?

A. I reckon it certainly would have been an inconvenience.

Q. 312. Why would it?

A. Because we are dependent to a very great extent on the public here for the sale of our flour.

Q. 313. By "the public here" you mean in the vicinity of Washington?

A. Washington, D. C.

Q. 314. You have attained a high reputation for your flour here, have you not?

A. Yes.

Q. 315. Are you not very desirous of maintaining it?

A. Yes, that is true.

Q. 316. It has been the result of years of devotion to all the improvements, has it not?

A. Yes sir.

Q. 317. Were you not afraid if this case had gone in favor of the plaintiffs in the supreme court on appeal that you might be stopped by an injunction?

A. After the agreement had been made?

Q. 318. No; before the agreement was made.

A. That would have been a natural consequence I reckon.

Q. 319. Do you not know that you feared it?

A. Yes, sir, I feared it.

Q. 320. Do you not know that you expressed that fear to Mr. Cox and others?

A. No, sir; I do not remember that I ever had occasion to express such a fear to him.

Q. 321. Do you not know that it was mentioned at the time of your agreement that no injunction was to be issued to stop your mill?

A. No, I do not know any such thing; there was not a word talked about an injunction that I recollect; you mean the agreement between myself and Mr. Cox as to compensation?

Q. 322. Yes.

A. There was not a word of that sort mentioned, so far as I recollect.

Q. 323. Did you not understand at that time that no injunction was to issue in case the decision was in favor of the plaintiffs?

A. No, sir; I was not assured of that until after the agreement as to compensation.

Q. 324. But after you had made the agreement as to compensation, were you not then assured that no injunction could issue?

A. Of course I was.

Q. 325. Was not that a great relief to your mind?

A. Yes, certainly it was.

Q. 326. Did the $250 which you paid to Mr. Cady and the $100 which you paid to Mr. Merriman come out of your own pocket?

A. Out of the funds of the firm of Herr & Welch. I considered that they were both equally bound.

Q. 327. But in fact you paid it all, individually?

A. I gave it out of what I understood to be the funds of the firm under that agreement. I paid it under the agreement which Herr and Welch had entered into to defray the expenses incident to the prosecution of law suits.

Q. 328. Was any discussion had between you and the defendants as to the fees for the argument in the Supreme Court of the United States?

A. I do not recollect.

Q. 329. Do you remember one of the Welches offering to furnish funds if Mr. Davidge was employed to argue the case?

A. I do not.

Q. 330. Can you say that he did not offer to pay Mr. Davidge?

A. I have no recollection of such an offer, whatever.

Q. 331. Was he not urgent to have Mr. Davidge employed?

A. He urged the matter at first, but after talking it over, he acquiesced.

Q. 332. Do you know what his motive was in insisting at first upon Mr. Davidge being employed?

A. I do not.

Q. 333. Did he never state to you that he was familiar with the case?

A. He may have done so, but I have no recollection of it.

Cross-examination.

By Mr. Mason:

Cross-Q. 334. You spoke about the use or the ownership of the Welch patents, and of things that had been done with them; is it not true that you had, before you were sued by Cochrane and others, made considerable amounts of money out of the sales of interests and licenses under the Welch patents?

(Mr. Harding states that this witness being produced by the appellants, he requests that counsel for appellants, being in privity with him, as shown by their producing his affidavit, will please propound questions in a form less leading.)

Cross-Q. 335. I will re-state my question: What amount of money, if any, had you made out of the Welch patents before the suit of Cochrane *et al. vs.* Deener *et al.* was commenced?

A. Do you mean for licenses?

Cross-Q. 336. Yes.

A. One thousand dollars is all we ever received. I was not in the interest of those patents, at least, not concerned with the young gentlemen until some time after they had made a considerable amount.

Cross-Q. 337. State if you know, and as nearly as you know, what amount of money had been made by the owners of the Welch patents on account of licenses before

the institution of the suit of Cochrane *et al. vs* Deener *et al.*

(Mr. Harding objects to anything that is not within witness's own knowledge.)

A. I derive that altogether from hearsay.

Cross-Q. 338. Please state what you know or have heard about it.

(Mr. Harding objects to any question calling for hearsay evidence.)

A. I heard that they had made $10,000 in one case.

Cross-Q. 339. Did you hear of any other sale?

A. I heard of other sales in the neighborhood of Winchester.

(Mr. Harding renews his objection as to hearsay testimony.)

Cross-Q. 340. You have spoken of suits having been instituted by the owners of the Welch and other patents; had not these suits been instituted before the commencement of the suit by Cochrane *et al.* against Deener *et al.*?

A. Yes, sir; all had been commenced before.

Cross-Q. 341. Among those suits was there a suit against the owners of the Cochrane patent?

A. Yes, sir.

Cross-Q. 342. Can you state what the object of that suit was?

A. As near as I understand it, it was to prevent a certain reissue that Mr. Cochrane had obtained from the Patent Office from going into effect, on the ground that it infringed, or rather on the ground that it covered more ground than the original.

Cross-Q. 343. You stated in your examination-in-chief that as a general thing your organization or association, or whatever it was, agreed in their consultations about things that were to be done; who was it that generally carried into effect their agreements so far as they related to the subject of the litigation between Cochrane and the defendants; was it yourself or somebody else?

A. In the first instance, we had a general understanding, and especially before those suits were brought; I think we had a meeting at Mr. Welch's house the evening before they started for the West. I then protested against the bringing of any suit, as I stated, but when they reached

St. Louis, they saw proper to take the matter into their own hands, and brought suit there, as well as at Rochester on their return.

Cross-Q. 344. You have misunderstood my question. You have stated in your examination-in-chief that in the ordinary conduct of the affairs of that organization you agreed on something that was to be done; were you, or somebody else, generally deputed to carry into effect the things that should be done?

(Mr. Harding objects to the question as leading, under the request heretofore made.)

A. I was generally requested to carry it out.

Cross-Q. 345. You stated with regard to your conversation with Mr. Cox, that your movement was induced by something that I had said in the argument of the case in the court below; please state in full what you were about to state, and your motives?

(Mr. Harding renews his objection.)

A. I understand you to say that your intention was not to charge enormous rates, and that on that basis I presumed to ask Mr. Cox what he would agree to settle the matter for, in the event that the suit went against us.

(Answer objected to by Mr. Harding.)

Cross-Q. 346. Were you informed at the time you were recommended to employ Mr. Cady to argue the case in the Supreme Court of the United States, whether or not he had been made familiar with the subject of middlings purifiers?

(Objected to by Mr. Harding.)

A. He was recommended to me on this ground by Mr. Bramhall.

(Answer objected to by Mr. Harding.)

Cross-Q. 347. I understood you to say that Mr. Bramhall was the president of the Metropolitan Middlings Purifier Company?

A. Yes, sir.

Cross-Q. 348. Do you know how long Mr. Cady had been connected with that company as their attorney?

A. I do not.

Cross-Q. 349. Did Mr. Bramhall, in recommending you to employ Mr. Cady, state to you how long Mr. Cady had given attention to the study of this subject?

(Objected to by Mr. Harding, as calling for hearsay evidence.)

A. He recommended him as being thoroughly familiar with patent practice.

Cross-Q. 350. For this particular subject?

A. A patent lawyer.

Cross-Q. 351. Did he tell you about his acquaintance with the particular subject of manufacturing flour and purifying middlings?

(Objected to by Mr. Harding.)

A. I do not remember.

Cross-Q. 352. Did I understand you correctly, that when you came to Mr. Cox to discuss the subject of settling the case, your associates were expressing an unwillingness to go on with the appeal case, and to submit upon printed argument?

(Objected to by Mr. Harding.)

A. I think that was one reason why I went; there might have been others.

Re-direct Examination.

By Mr. HARDING:

Q. 353. You were quite desirous of getting this thing off your mind, were you not?

(Objected to by Mr. Mason, as leading.)

A. Yes; I admit that that is very natural.

Q. 354. And you felt freer and easier in mind, did you no, after you had made this arrangement with Mr. Cox?

(Objected to by Mr. Mason, as tending to confuse the record as to which party is testifying, Mr. Harding or Mr. Herr.)

A. I did.

Q. 355. You were less disposed to spend money in defending it after that, were you not?

(Objected to by Mr. Mason, on the ground that counsel has no right to put words into the mouth of his own witness. There is no privity between these complainants and Mr. Herr, and nothing in this case that authorizes this course of examination.)

A. My desire was to defeat Mr. Cochrane, if I could, in any honorable way.

Q. 356. Were you, or not, less disposed to spend money in defending this suit, after the settlement with Mr. Cox, than you were before?

A. There was no necessity for further expenditure of money; I was not called upon, that I can recollect.

Q. 357. Did you or not feel less interested in the case, and in the preparation of it and its result, after this settlement, than you did before?

A. What settlement do you refer to?

Q. 358. I mean the settlement with Mr. Cox, by which you were to pay $250 cash yourself, and $250 in a note, if you were beaten?

A. If I remember right, all the counsel had been engaged, and there was no further necessity for the expenditure of money.

Q. 359. I do not ask you about the expenditure of money; I ask you about your interest, whether you felt more or less anxiety and interest about that settlement than you did before?

A. I suppose I felt less anxiety, but it was a matter of business and disposed of, and I cannot say that I have any particular recollection.

Q. 360. Will you say that you felt no anxiety before you made that settlement about the possibility of the mill being stopped by injunction, and you having heavy damages to pay?

A. Of course I felt anxious about it.

Q. 361. Did you not feel very anxious about it?

A. I don't think I felt extremely anxious.

Q. 362. Will you say you did not feel very anxious about it?

A. Yes; I will say that I did not feel very anxious about it. I felt some anxiety.

Q. 363. What made you feel anxious?

A. Simply because I preferred to have the mattar arranged, and rid myself of the suspense.

Q. 364. What suspense?

A. Incident to a lawsuit, or this injunction that might be brought upon me.

Q. 365. What trouble did you expect to have from an unfavorable decision prior to making this settlement?

A. I expected my mill might be stopped. I had no experience in matters of that sort.

Q. 366. Was that the principal weight upon your mind—your mill being stopped if the suit went against you—prior to making this settlement?

A. And the loss that I might sustain by stoppage of our manufacture of flour.

Q. 367. Do you not think that the reason of the mill being stopped and the loss incident to the stoppage would be calculated to make a man feel very anxious about the result of his suit?

A. Yes; it would make a man feel anxious.

Q. 368. Do you not think the question of the stoppage of a man's mill would make him feel very anxious?

A. I admit that.

Q. 369. And this danger was present to your mind before you made the settlement, was it not?

A. The fact is, I had never thought much over it.

Q. 370. Was not that danger present to your mind?

A. Occasionally I thought that. As to its being an absorbing thought, it never was.

Q. 371. When you went to see Mr. Cox and talked to him, was it in the hope that you would get rid of that danger?

A. That was my object.

(Mr. Mason objects to this course of investigation, on the ground that there is nothing in the cross-examination of this witness to justify it.)

Q. 372. And that was the great thing present to your mind, was it not?

A. Not an absorbing thought.

Q. 373. But that was your main motive in adjusting this case?

A. In calling upon him?

Q. 374. After you left him, the only risk you had was $500 in the matter, was it not, as you understood it?

A. Yes, sir; that is about all.

Q. 375. Are you certain you expended this $250 to Mr. Cady before or after that visit?

A. I am not certain about that.

Q. 376. Was it understood at that visit that you were to employ counsel and to have the case argued?

A. With Mr. Cox?

Q. 377. Yes.

A. Mr. Cox urged me to get the best counsel I could.

Q. 378. Was it understood that you were to encounter the expense of employing counsel at the time of that settlement?

A. Yes, sir. Well, there was no conversation between Mr. Cox and myself upon that subject, as far as I can recollect.

Q. 379. But Mr. Cox told you to go and employ counsel, did he not?

A. Yes, sir.

Q. 380. So it was understood to that extent, was it not, between you, that the case was to be defended in the Supreme Court?

A. Yes, sir.

Q. 381. You understood that you were not to back out of the court, did you not?

A. Yes, sir.

Q. 382. You have said that you told your counsel, Mr. Cady, to make as good an argument as he could, have you not?

A. I meant—to use my phraseology—to do the best he could.

Q. 383. And when Mr. Cady told you that the case was bigger than he thought it was, and wanted more money, you declined to give it to him, did you not?

(Objected to by Mr. Mason, on the ground that the witness has not stated that Mr. Cady has ever said that the case was bigger than he thought it was.)

A. Mr. Cady told me that it required more labor than he expected. I think that is about what he stated, and he intimated, though he did not say directly, that he must have more compensation, or that he ought to have; but I told him that he had made his agreement, and I expected him to comply with it, and that was the end of it.

Q. 384. At the time you refused to give him more money did you renew your request to him to be more diligent?

A. I did; up to the very last moment. I told you that I made about five or six visits, or perhaps more, and that I urged them every time to use their best efforts.

Q. 385. Did you repeat that expression to him?

A. Something of that sort, perhaps; that is not the identical language, but that is what I meant.

Q. 386. Did you think it necessary to keep urging them?

A. Well, for some reason or other they did not get their arguments up as soon as I expected, and I urged them to do so.

Q. 387. Did the counsel on the other side urge you to urge them, or either of the parties?

A. Yes, sir; they did.

Q. 388. What did they say to you?

A. They wanted me to see that the arguments were attended to.

Q. 389. Did they constantly urge you to see that the arguments were attended to?

A. No, not constantly, but several times, however.

Q. 390. This was as the time approached for filing the arguments, was it?

A. Yes, sir.

Q. 391. Do you know why it was that your counsel were so slow in filing their arguments?

A. I cannot tell you.

Q. 392. Did they not seem to lack that zeal which you had looked for?

A. No; my impression is that the counsel on the other side were not prepared.

Q. 393. How came they to urge you to have your counsel prepared if they were not up?

A. The idea was to be ready at a certain time, without fail, I suppose.

Q. 394. You have stated that you had the principal conduct of the case, so far as the clients were concerned, in conference with counsel, have you not?

A. Yes.

Q. 395. Were you ever shown the appellants' arguments in the Supreme Court of the United States before the appellees' arguments were filed?

A. No, sir; I have no recollection of that sort.

Q. 396. Your counsel never called your attention to what had been said on the other side, did they?

A. No, sir.

A. With Mr. Cox?

Q. 377. Yes.

A. Mr. Cox urged me to get the best counsel I could.

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A. I meant—to use my phraseology—to do the best he could.

Q. 383. And when Mr. Cady told you that the case was bigger than he thought it was, and wanted more money, you declined to give it to him, did you not?

(Objected to by Mr. Mason, on the ground that the witness has not stated that Mr. Cady has ever said that the case was bigger than he thought it was.)

A. Mr. Cady told me that it required more labor than he expected. I think that is about what he stated, and he intimated, though he did not say directly, that he must have more compensation, or that he ought to have; but I told him that he had made his agreement, and I expected him to comply with it, and that was the end of it.

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A. No; my impression is that the counsel on the other side were not prepared.

Q. 393. How came they to urge you to have your counsel prepared if they were not up?

A. The idea was to be ready at a certain time, without fail, I suppose.

Q. 394. You have stated that you had the principal conduct of the case, so far as the clients were concerned, in conference with counsel, have you not?

A. Yes.

Q. 395. Were you ever shown the appellants' arguments in the Supreme Court of the United States before the appellees' arguments were filed?

A. No, sir; I have no recollection of that sort.

Q. 396. Your counsel never called your attention to what had been said on the other side, did they?

A. No, sir.

Re-cross-examination.

By Mr. MASON:

Q. 397. Whether in your discussions with Mr. Davidge, after the appeal to the Supreme Court of the United States, and relating to the subject of an oral argument or a printed one, Mr. Davidge did not tell you that if the case were postponed to be argued in its regular course on the docket, it would not be disposed of until after the patent had expired?

A. That point was discussed; but whether Mr. Davidge made the suggestion, or some one else, I am not prepared to say.

Q. 398. What was the understanding with regard to that matter, as to the case being reached during the lifetime of the patent?

A. The impression among us was that it would not be ready if it was argued orally.

(Mr. Harding requests the witness to produce at the meeting to-morrow the several papers called for in the course of his examination to-day, of which a memorandum has been given him, and also any other memoranda in writing relating to this matter.)

The witness appeared on the following day, as requested, and produced the following papers:

MONDAY, *Dec.* 3, 1877.

The witness appears to-day for the purpose of having his testimony read over to him after being written out by the stenographic reporter, and desires to add to his answer to the 374 question the following: "Except such effect as it might have on the value of the patents I was interested in."

(Mr. Harding objects to the witness altering his testimony at this date, and desires to examine him in reference to this alteration.)

Q. 399. After you became the part owner of the Welch patents under the agreement, Exhibit "C," did you and your associates purchase the Wheeler patent and the Reynolds patent; and if so, why?

A. We purchased the Wheeler and the Reynolds

patent under the supposition that the combined important principles contained in the Welch patents, and as they ante-dated the Welch patent, they were deemed of great importance by my associates; I never gave the matter my personal attention, never having seen either of the patents or models.

Q. 400. Why did you not continue to invest money in prosecuting suits under the Welch patents and under the Reynolds patents, and why did you discontinue the employment of Mr. Merriman?

A. I discontinued the suits referred to because I was advised to do so by counsel, including Judge Merriman. It was the desire of my associates to ignore a certain stipulation referred to in the early part of this deposition. I was directed by my associates to dismiss Judge Merriman and employ Mr. Davidge.

Q. 401. To employ Mr. Davidge to do what?

A. To take charge of the suit and defend it. Subsequently, perhaps a fortnight afterwards, they withdrew their authority to employ Mr. Davidge, and requested me to reinstate Judge Merriman.

Q. 402. Did they give this instruction in writing?

A. I think they did.

Q. 403. Between the time they instructed you to employ Mr. Davidge and dismiss Merriman, and the time they instructed you not to employ Davidge, to employ Merriman, had you not made this agreement with Mr. Cox, of which you have spoken several times in your testimony.

A. My recollection is that the agreement between Mr. Cox and myself was entered into after Judge Merriman was reinstated.

Q. 404. Are you certain of that?

A. I feel so.

Q. 405. What makes you feel certain of that fact?

A. I can't give you any other reason but that my mind is fully impressed to that effect.

Q. 406. What induced your associates to change their minds and not employ Mr. Davidge, after having once resolved to employ him, and directed you to employ him and dismiss Merriman?

A. After talking the matter over fully, it was concluded that we were bound to carry out the stipulation with the

plaintiffs to submit the case on printed arguments, and as Mr. Davidge was not disposed to undertake the case except that he could argue it orally, I was instructed to do as I did.

Q. 407. Can you state to me what motive was presented to you or your associates during that discussion which induced you and them to disregard Mr. Davidge's advice and not employ him?

A. We thought we were honorably bound to carry out our stipulation. Then we also kept in view the consequences of the failure of the suit should we ignore our stipulation.

Q. 408. Did you explain to your counsel, Mr. Merriman and Mr. Cady, the understanding which you and Mr. Cox had, that in case the suit was decided against you, you and Mr. Welch were to have releases and license, as heretofore stated by you?

A. I think not. I have no recollection.

Q. 409. Why did you not tell your counsel of this agreement?

A. I saw no necessity of doing so.

Q. 410. Had you no other reason for not doing so?

A. None that I can think of at this time.

Q. 411. Do you know when or in what way Mr Cox became informed that the appellees were going to submit the case on printed argument?

A. I cannot say. My impression is that he got the information through our counsel. Don't think that I told him.

Q. 412. Why did you not continue to spend money in prosecuting suits under the Welch patents?

A. I was advised by Mr. H. B Renwick to withdraw the suits. We didn't think that we could sustain ourselves in any suit that we might undertake.

Q. 413. Was this opinion of Mr. Renwick given to you about the time that Mr. Merriman's opinion was given to you, of which an exhibit has been made?

A. I think it was before; some time before.

Q. 414. Did you instruct your counsel, Mr. Cady and Mr. Merriman, to make another argument?

A. I do not know that I did; Judge Merriman knew that that was expected of him, and as to Mr. Cady, he was

engaged with that understanding, that he was to make a written argument.

Q. 415. Did Mr. Renwick tell you why you could not succeed with the Welch patents?

A. I can't give his opinion exactly, but he led me to believe that we infringed machines that ante-dated our patents.

Q. 416. Did you suppose that your patents were bad on that account?

A. Not wholly so; I looked upon it as a mere matter of opinion with him, and did not despair of making something out of them.

Q. 417. If you did not despair, why did you discontinue the employment of Mr. Merriman, in the summer of 1876, upon his giving that opinion to you?

A. I had the advice of Mr. Renwick, Mr. Davidge, and Judge Merriman to continue the cases; I thought that was sufficient, my hopes to the contrary notwithstanding.

Q. 418. Do you not think the fact that Mr. Cox declined to put the agreement in writing when you requested it, and the reason that he gave you for not doing so, as stated by you, influenced your mind in not stating that agreement to your counsel?

A. I think not.

Q. 419. Can you state any motive that influenced you in not informing your counsel?

A. I saw no advantage in making it known to them.

Q. 420. Did you ever tell them, even after the discussion in the case?

A. I have no recollection that I did.

Q. 421. So far as you know, your counsel never heard of this agreement until brought out by this investigation?

A. That is in accordance with my recollection; I have no recollection of ever having told them of it.

A. H. HERR.

Mr. A. H. Herr, in response to the request of Mr. Harding, produces—

The letter of Mr. Merriman containing his advice to withdraw suits, which, at Mr. Harding's request, is marked Exhibit "A."

The lease of A. H. Herr to the defendants Deener, Cissell & Welch, marked Exhibit "B."

Agreement between the owners of the Welch patents and J. S. Welch and A. H. Herr, marked Exhibit "C."

Receipt of Walter S. Cox, dated April 4, 1877, to A. H. Herr, marked Exhibit "D."

Mr. Mason admits that there was a similar paper given to Mr. Herr for Jas. S. Welch, relating to Mr. Welch's mill.

Receipts showing all amounts paid to Mr. A. L. Merriman, marked Exhibit Receipts, after date of separation of Mr. Merriman from Mr. Maloney, numbered "Exhibit Receipts 1 to 12."

Mr. Mason agrees that the examiner may annex copies of the several exhibits and return them to the court instead of the originals.

And the copies are accordingly hereto annexed.

EXHIBIT A.

(Copy.)

WASHINGTON, *Aug.* 24, 1876.

A. H. HERR:

DEAR SIR: In the matter of the suits brought by Herr, Welch and others against sundry parties on the Wheeler & Reynolds & E. P. Welch patents, some of which have been withdrawn and others are now pending, I have advised such withdrawal, and advise the withdrawal of the suits still pending.

Respectfully, &c.,

A. L. MERRIMAN.

We fully concur in the above, and authorize you to withdraw all the suits now pending.

JAMES H. WELCH.
ROSIA W. WELCH.
E. P. WELCH.

JAS. S. WELCH.

EXHIBIT B.

(Copy.)

This indenture, made this 12th day of July, one thousand eight hundred and seventy-five, between A. H. Herr of the first part, and Josiah W. Deener, George W. Cissell, James H. Welch, R. W. Welch, E. P. Welch, and Austin Herr, trading under the firm of Deener, Cissell & Welch, of the second part, all of the District of Columbia, witnesseth: That the said A. H. Herr, for and in consideration of the rents and covenants hereinafter stipullated to be paid and performed on the part of said Deener, Cissell & Welch, hath let, and by these presents doth grant, demise, and to farm let unto the said Deener, Cissell & Welch, their executors, administrators and assigns, all his, the said Herr's, flour mills in Georgetown, in the District aforesaid, situated at the corner of Grace and Potomac streets, south of the Chesapeake and Ohio Canal, and known as the Pioneer Mills, with all the fixtures and machinery thereunto belonging, and also the warehouse property used in connection with the same, on the southeast corner of Grace and Potomac streets; to have and to hold said premises, with the appurtenances, unto the said Deener, Cissell & Welch, their executors, administrators and assigns, for and during the full term of four years from the first day of July, (1875,) eighteen hundred and seventy-five, fully to be complete and ended, yielding and paying therefor for each and every year of said term the yearly rent of eight thousand dollars, to be paid in four equal quarter-yearly instalments.

And the said A. H. Herr hereby covenants and agrees to and with the said Deener, Cissell and Welch, that they shall, during the term aforesaid, have the exclusive right and privilege of using his, said Herr's, trade-mark or brand, known and designated as "A. H. Herr's best family flour." Also "Peerless" and "Swiss Process" brands. And that the said Herr will prevent any other person or persons from using the same.

And the said Deener, Cissell and Welch do hereby covenant and agree to and with the said A. H. Herr, his heirs and assigns, to accept this lease, and to pay to the said Herr the yearly rent aforesaid, as herein specified, except

as hereinafter provided, without default, and that they will punctually pay all water rents hereinafter to accrue to the Chesapeake and Ohio Canal Company for the use of the water supplied to said mills, and that they shall not, nor will, during said term assign, transfer, underlet, or otherwise by any act or deed procure the said premises, or any part thereof, to be assigned, transferred, or underlet to any person or persons whomsoever without the consent, in writing, of the said A. H. Herr, his heirs or assigns, first had and obtained; and further, that at the expiration or other sooner determination of said term, they will peaceably surrender the said premises to the said A. H. Herr, his heirs or assigns, in like good order and condition as at present, reasonable wear and tear and damage by fire excepted.

It is further mutually agreed by and between said parties, that if the said mill should be destroyed by the elements during said term, this lease shall thereupon immediately cease and expire, and if either of the said parties of the second part should die during the said term, then said lease shall terminate at the end of the current year of said term in which such death shall occur.

In testimony whereof, said parties have hereunto set their hands and seals on the day and year first aforesaid.

A. H. HERR, [SEAL.]
JOSIAH W. DEENER,
GEO. W. CISSELL,
JAMES H. WELCH,
ROSIA W. WELCH,
E. P. WELCH.

EXHIBIT C.

(Copy.)

This agreement, made this twenty-second day of April, in the year one thousand eight hundred and seventy-four, by and between E. P. Welch, J. H. Welch, and R. W. Welch of the first part, H. P. Welch and J. A. Maloney of the second part, and J. S. Welch and A. H. Herr of the third part, witnesseth: Whereas the said parties of the first and second parts are the sole owners and proprietors of certain letters-patent for middlings purifiers, issued

and bearing date, respectively, the 26th day of November, 1872, No. 133,509; the 18th day of February, 1873, No. 135,952; the 18th day of February, 1873, No. 135,953, and the 1st day of April, 1873, No. 5,346, reissue; and whereas the said parties of the first and second parts are desirous of having said machines introduced into general use, without for the present making any advances of money or incurring any expenditures in that behalf.

And whereas they are now engaged in a suit in interference before the United States Patent Office, in the further prosecution of which certain outlays of money will be required.

And whereas, for and in consideration of the premises and the covenants on the part of the parties of the third part to be performed, and hereinafter contained, they, the said parties of the first and second parts, desire to associate the said parties of the third part with them in the ownership of the said patent rights, to which end the said E. P. Welch, J. H. Welch and R. W. Welch are to assign to said parties of the third part a sufficient portion of their interest in said patents to constitute the said parties of the third part jointly equal owners with them, the said E. P. Welch, J. H. Welch, and R. W. Welch, in the said patents; that is to say, of the one-fourth each individual interest of the said E. P. Welch, J. H. Welch, and R. W. Welch, they shall each assign to said parties of the third part a one-sixteenth ($\frac{1}{16}$) part of the entirety, in which event the ownership of said three-fourths of the entirety now held by said E. P. Welch, J. H. Welch, and R. W. Welch shall be distributed in the proportion of three-sixteenths ($\frac{3}{16}$) of the entirety to said E. P. Welch, a like interest to J. H. Welch, a like interest to R. W. Welch, and the remaining three-sixteenths ($\frac{3}{16}$) to said J. S. Welch and A. H. Herr; and further, by a power of attorney, to be duly executed by the said parties of the first and second parts, to vest in them, the said parties of the third part, the power of full, sole, and exclusive management and control of the introduction and sale of rights to use said machines and to make contracts, and do all things necessary in this behalf, as in their best judgment and discretion may be deemed proper.

And whereas the said parties of the third part, in con-

sideration of the premises, the assignment, and power of attorney above mentioned, have agreed and do hereby agree to undertake the introduction of said machines, and to advance from their own funds and to pay such necessary expenses as may be thereby incurred, and to further bear the expenses of said interference suit, *to be hereafter incurred* in prosecuting the same before the Patent Office, and if the judgment of that office should be adverse, then until the judgment of the supreme court of the District of Columbia shall have been had thereon, it being expressly understood that no obligation shall rest upon the said parties of the third part to bear, pay, or advance any sums necessary in the conduct of said suit beyond said supreme court of the District of Columbia, unless and except a sum sufficient to reimburse them for such outlay as they may have already made in the sale of said machines and in the conduct of said litigation shall have been realized from such sales, and unless and except there shall at such time be in their hands a sum, in their judgment, sufficient to pay the further expenses of said suit in the Supreme Court of the United States.

And the said parties of the third part further agree to exert themselves to the utmost of their and each of their endeavors in making sales of said machines, and for the joint benefit and advantage of all in the premises.

And they agree to keep books of account in which shall be made true, just, and accurate entries of all sums of money advanced, received, laid out, and expended in and about the same, and of any and all things pertaining said business, which said books of account, as well as all correspondence in relation to said business, shall at all times be open to the inspection of the parties hereto and each of them whenever desired.

It is agreed and understood by and between the parties hereto that out of the proceeds of such sales as the same may be made the said parties of the third part shall and may reimburse themselves for any advances which they may have made, and for any expenses incurred in effecting the same and in the prosecution of said suit, and that from time to time, whenever the sums realized by the said parties of the third part shall amount to more than one thousand (1,000) dollars, and such sum shall be over and above all

debts and liabilities, then a distribution shall be had among the parties hereto in the proportion of their respective interests, it being the intention of the parties hereto to allow to remain in the hands of the said parties of the third part the sum of one thousand (1,000) dollars as a fund to provide for further expenses and contingencies.

It is further understood and agreed that neither of the parties to this instrument shall sell or dispose of any part or portion of his interest to any person or persons without the consent of the others first had and obtained.

And it is further understood and agreed by and between the parties thereto that in the event of a failure on the part of the said parties hereto of the third part to carry out in good faith the covenants and agreements on their part contained herein, then and in that event the interest, for the assignment of which provision is herein made to said parties of the third part, shall revert to the said E. P. Welch, J. H. Welch, and R. W. Welch, and the said power of attorney shall be cancelled, revoked, and for naught held.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year above mentioned.

E. P. WELCH. [SEAL.]
JAS. H. WELCH. [SEAL.]
R. W. WELCH. [SEAL.]
PRINCE H. WELCH. [SEAL.]
JAMES A. MALONEY. [SEAL.]
JAS. S. WELCH. [SEAL.]
A. H. HERR. [SEAL.]

Signed and sealed in the presence of—

HUGH T. TAGGART,
J. E. GRIFFITH,

As to signatures and seals of J. A. Maloney and A. H. Herr.

DAVID EDES,
ARTHUR BYINGTON,

As to signatures of E. P. Welch, J. H. Welch, R. W. Welch, P. H. Welch.

CHAS. REED,
JOHN N. BROWN,

As to J. S. Welch's signature.

EXHIBIT D.

(Copy.)

COCHRANE *et al.*
vs.
DEENER, CISSELL, *et al.*

Received of A. H. Herr, Esq., two hundred and fifty dollars and his note for $250, at one year, being part of the sum of one thousand dollars agreed to be paid in settlement of the above cause. The said settlement includes the privilege of using the invention claimed by the complainants during the continuance of their patents in the Pioneer Mill in Georgetown.

WALTER S. COX,
President American Middlings Purifier Co.

APRIL 4, 1877.

Exhibit Receipts.

(Copies.)

No. 1.

WASHINGTON, *June* 17, 1876.

Received of A. H. Herr twenty dollars for weekly payment to date.

A. L. MERRIMAN.

—

No. 2.

Received of A. H. Herr twenty dollars for week's salary on patent cases ending June 24, 1876.

A. L. MERRIMAN.

—

No. 3.

Received of A. H. Herr twenty dollars week's salary, ending July 1, 1876.

A. L. MERRIMAN.

—

No. 4.

Received of A. H. Herr twenty dollars on account of weekly payment to July 8, 1876.

A. L. MERRIMAN.

No. 5.

WASHINGTON, *July* 15, 1876.

Received of A. H. Herr twenty dollars for week ending this date.

A. L. MERRIMAN.

—

No. 6.

Received of A. H. Herr forty dollars, being two weeks' salary in patent cases, ending July 29, 1876.

A. L. MERRIMAN.

—

No. 7.

Received of A. H. Herr twenty dollars, counsel fees to date, Aug. 5, 1876.

A. L. MERRIMAN.

—

No. 8.

Received of A. H. Herr twenty dollars for week salary, Aug. 12, 1876.

A. L. MERRIMAN.

—

No. 9.

Received of A. H. Herr forty dollars, being two weeks' instalment of fees, ending Aug. 26, '76.

A. L. MERRIMAN.

Dated Aug. 23, '76.

—

No. 10.

Received of A. H. Herr forty dollars, being two weeks' salary to Sep. 9, 1876.

A. L. MERRIMAN.

—

No. 11.

Received of A. H. Herr sixty dollars on account of fee in Cochrane case in Supreme Court.

A. L. MERRIMAN.

Sep'r 30, 1876.

No. 12.

WASHINGTON, *Nov.* 1*st*, 1876.

Received of A. H. Herr forty dollars in full for cases of Cochrane *vs.* Deener *et al.*, in Supreme Court.

A. L. MERRIMAN.

—

Also the circular issued by A. H. Herr and his associates, referred to in his examination, marked Exhibit "E," and hereto attached.

EXHIBIT E.

JAS. S. WELCH, *President*, E. P. WELCH, *Vice-President*,
A. H. HERR, *Treasurer*, J. A. MALONEY, *Secretary*.

OFFICE OF THE NATIONAL MIDDLINGS-PURIFYING COMPANY,
WASHINGTON, D. C. *April* 15, 1875.

To all whom it may concern:

In the year 1871, millers throughout the country were surprised at brands of flour bearing the names of "Snow Drop" and "Washburn" making their appearance upon the New York and Boston markets, and then readily bringing prices ranging trom $2.50 to $4.00 more per barrel than other brands of family flour.

The secret of its manufacture soon leaked out by means of a circular issued by Messrs. G. H. Christian & Co., proprietors of the Washburn Flouring Mill, of Minneapolis, Minn., and dated May 31, 1872, in which they offered to sell the information, or rather description, of the construction of the machine, which was patented in France by a Monsieur Perrigault, and was supposed by Mr. Christian to be public property in this country, hence the offer to give the information for fifty dollars. The principle of the Perrigault machine, however, had been anticipated and patented in this country in 1863, as we will hereinafter show.

Since 1871 there have been patents granted upon 130 improvements upon the original broad principle of the invention. The patent before referred to was granted to Jesse B. Wheeler, April 14, 1863, and reissued to us as the assignees of said Wheeler, February 23, 1875, No. 6,307.

This patent covers all machines using the following ele-

ments in their construction: A rectangular air-tight case, suction-fan, perforated diaphragm or screen, and feed-regulator to feed the material on to said screen evenly and of a uniform depth, means for agitating and moving the material in one direction, while the air drawn up by the fan passes in another direction, and hopper placed beneath said screen with openings for the admission of air.

Then, again, a machine has been extensively introduced into mills by E. N. Lacroix, C. E. Whitmore & Co., and others, having for their element of construction an air-tight case, a movable horizontal screen, an exhaust or suction fan, a blower-fan, and auxiliary air-pipes to convey the air generated by the blower-fan directly under the screen, to lighten up the dust and deleterious matter from the material, and keep the perforation of the screen open.

All machines using the elements above described are infringing the patent granted to R. S. Reynolds, June 23, 1863, and reissued to us, as the assignees of said Reynolds, March 30, 1875, No. 6,361.

We are disposed to deal liberally with those who desire to protect themselves with a license from us under the above-mentioned patents, as they are the foundation patents on Middlings Purifiers, and we are determined to prosecute to the full extent of the law all infringers of the same.

For further particulars, address

JAS. S. WELSH, *President, Georgetown, D.C.*,

Or, our Attorneys A. L. MERRIMAN & Co.,

637 *F street N. W., Washington, D. C.*

To avoid delay, Mr. Mason agrees that the copy of the answer of Chase & Richardson to bill of complaint filed by A. H. Herr and others, in circuit court, United States, northern district of New York, and identified by Mr. Selden, be filed instead of a certified copy of the original, and it is hereto attached, marked Exhibit "F."

EXHIBIT F.

U. S. Circuit Court, Northern District of New York.

In Equity.

ABRAHAM H. HERR, JAMES S. WELCH, EDWARD P. WELCH, ROSIA W. WELCH, JAMES H. WELCH, JAS. A. MALONEY, AND JAS. S. WELCH, *administrator of Herbert P. Welch, deceased,*
Against
JOHN H. CHASE AND WILLIAM RICHARDSON.

The joint and several answer of John H. Chase and William Richardson to the bill of complaint of the above-named complainants.

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception which may be had or taken to the many errors, uncertainties, and insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised it is material for them to make answer unto, answer and say:

That they do not know and are not informed, save by said bill of complaint, whether the said Jesse B. Wheeler was the inventor of the said alleged improvements in grain driers in said bill of complaint mentioned, or whether he ever assigned to the said James A. Maloney the letters-patent number 38,191 in said bill of complaint mentioned, or whether the said Maloney ever became the owner thereof, and they leave the complainants to make such proof thereof as they shall be advised.

And these defendants further answering, say that they have been informed and believe that the said letters-patent number 38,191 were at some time surrendered and reissued, but by whom said surrender was made, or whose assent was given thereto, or to whom said letters were issued, these defendants are not advised save by said bill of complaint.

And these defendants further answering upon information and belief, say that the surrender of said letters-patent number 38,191, mentioned in said bill of complaint, which

was made to obtain said reissue, was not made on account of said letters being inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee having claimed as his own invention or discovery more than he had a right to claim as new, for these or any other reasons, but that such surrender was made with the fraudulent design of enlarging the claims of said patent, so as to embrace improvements or inventions not made by him prior to the time when the said original letters-patent were issued, and which are not contained therein. And that the said reissued letters-patent number 6,307 in the description and claims thereof embrace matters contained therein as the invention of said Wheeler, which were not invented by him prior to the issue of said original letters-patent.

And these defendants further answering, say, that they are not informed, save by said bill of complaint, whether the said James A. Maloney ever assigned to the said Abraham H. Herr, James S. Welch, Edward P. Welch, Rosia W. Welch, James H. Welch, and said Herbert P. Welch, said letters-patent, or any interest therein.

And these defendants further answering, say, that they do not know and are not informed, save by said bill of complaint, whether the said Ransom S. Reynolds, in said bill of complaint mentioned, ever assigned to said complainants the letters-patent number 38,985 in said bill of complaint mentioned, or any interest therein, or whether the said complainants ever became the owners and proprietors of said letters-patent, and these defendants futher answering, say that they have been informed and believe that the said letters-patent, number 38,985, were at some time surrendered and reissued, but by whom the said surrender was made, or whose assent was given thereto, or to whom said letters were reissued, these defendants are not advised save by said bill of complaint.

And these defendants further answering upon information and belief, say, that the surrender of said letters-patent number 38,985, mentioned in said bill of complaint, which was made to obtain said reissue, was not made on account of a defective or insufficient specification, or by reason of the patentee having claimed as his own invention or discovery more than he had a right to claim as new, for these or any

other reasons, but that said surrender was made with the fraudulent design of enlarging the claims of his patent so as to embrace improvements or inventions not made by him prior to the time when the original letters-patent were issued, and which are not embraced therein; and that the said reissued letters-patent in the description and claims thereof embrace matters contained therein as the invention of the said Reynolds, which were not invented by him prior to the issue of the said original letters-patent.

And these defendants further answering, deny that they are or were at the time or times mentioned in the said bill of complaint using a machine or machines so constructed as to embrace the improvements specified in and contained in one or both of the reisued patents, or any of said improvements.

And these defendants further answering, deny that they have refused to pay or to account to the complainants for any profits made by them by the use of the rights alleged in said bill of complaint to be secured to the complainants by said letters-patent, or to desist from such use, for the reason that they have never made such use, and have never made any such profits, nor has any such demand been made to them.

And these defendants, further answering, admit that they are and were at the time of filing said bill of complaint, to some extent, but not largely, engaged in the manufacture of flour in the city of Rochester, and they state that the kind of machine used by them for purifying the middlings of flour is constructed in substantial accordance with letters-patent issued by the United States Government to George T. Smith, on the 10th day of December, 1872, numbered 133,898. But these defendants deny that said machines so used by them embrace the improvements, or any of them, described in the letters-patent, or either of them, alleged in said bill of complaint to be owned by the said complainants; and they deny that the said letters-patent in the said bill of complaint mentioned, or the machines *or machines* described in them or either of them, or the process or processes described in them or either of them, is or are capable of being used to purify the middlings of flour, or were ever designed for or supposed to be applicable to that purpose; and said defendants further

allege and will maintain that no useful or efficient machine for purifying middlings has ever been or could be constructed and successfully used in accordance with the drawings and specifications of the said letters-patent or either of them.

And these defendants, further answering, upon information and belief, say that the said Jesse B. Wheeler and the said Ransom S. Reynolds, severally or otherwise, were not the first and original inventors of the said alleged improvements, respectively, in the said reissued letters-patent number 38,191 and number 38,985, in the said bill of complaint described, but that the same, prior to the supposed invention thereof by the said Wheeler and the said Reynolds, respectively, had been described in the following letters-patent, issued by the Queen of Great Britain to—

Alfred V. Newton, March 19, 1856, No. 659, for a machine for separating granular substances.

Edward Acres, sealed Feb. 9, 1854, and dated Dec. 8, 1854, No. *e* 584, for drying wheat and other grains.

Norton, Dec. 24, 1860, No. 3,159, apparatus for drying wheat, barley, and other grains and seeds.

And these defendants, further answering upon information and belief, say that the said alleged improvements, prior to the alleged invention thereof by the said Wheeler and the said Reynolds, respectively, were described in the French letters-patent, granted Aug. 16, 1860, to M. Perrigault, merchant of Rennes, France, by order of the minister of the department of agriculture, commerce, and public works, and dated Sep. 27, 1860, for a "mechanical sieve."

The same was also described prior to the said alleged invention thereof by the said Wheeler and the said Reynolds, respectively, in letters-patent issued by the Government of the United States to—

W. F. Cochrane, 37,321, Jan. 6, 1863, reissued Aug. 25, 1874, No. 6,029, machine for bolting flour.

W. F. Cochrane, 37,318, Jan. 6, 1863, reissued Aug. 25, 1874, No. 6,030, machine for bolting flour.

B. D. Saunders, 11,178, June 27, 1854, grain cleaner.

H. D. Reynolds, June 19, 1855, grain cleaner.

Joseph Bone, 11,116, June 20, 1854, grain separator.

George Arrowsmith, 29,045, July 10, 1860, grain separator.

Wm. R. Cox, 21,945, Nov. 2, 1858, grain cleaner.
John Outram, 30,540, Oct. 30, 1860, grain cleaner.
B. D. Saunders, 6,505, June 19, 1849, grain cleaner.
J. B. Crist, 23,903, May 10, 1859, grain cleaner.
H. H. Beach, 26,742, Jan. 10, 1860, grain winnower.
G. B. Turner, 28,117, May 1, 1860, smut machine.
A. Barned, 29,215, July 17, 1860, smut machine.
Wm. Eaton, July 28, 1843, threshing machine.
S. G. McMurtry, 19,303, Feb. 9, 1858, flour bolt.
W. O. Bourne, June 14, 1859, ore separator.
W. O. Bourne, Nov. 27, 1857, ore separator.
W. O. Bourne, Oct. 9, 1860, ore separator.
R. Shaler, March 20, 1855, ore separator.
T. J. Chubb, Oct. 13, 1857, ore separator.
T. J. Chubb, Aug. 25, 1857, gold separator.
T. J. Chubb, Sep. 1, 1857, ore separator.
E. L. Seymour, Aug. 30, 1859, ore concentrator.
T. J. Chubb, Dec. 19, 1854, metal separator.
E. L. Seymour, July 17, 1860, ore concentrator.
Mackey and Smith, Oct. 25, 1853, grain winnower.
L. S. Ingraham, Aug. 9, 1853, grain winnower.
J. L. Booth, April 8, 1851, grain winnower.
M. Bugher, Sep. 18, 1860, winnower.
D. Clow, June 16, 1846, fanning mill.
Sykes, 34,992, April 15, 1862, grain driers.
Scoville, Sep. 26, 1848, grain driers.
Wheeler, 30,572, Oct. 23, 1860, grain driers.
Wheeler, 35,241, May 13, 1862, grain driers.
Wheeler, 38,191, April 14, 1863, grain driers.
D. S. Wagener, Nov. 29, 1859, grain separators.
D. March, May 25, 1852, mill bolts.
A. Platt, Jan. 13, 1852, winnowers.
S. B. Robinson, June 20, 1854, grain drier.
J. F. Zimmerman, 9,579, Feb. 8, 1853, threshing machine.
J. F. Zimmerman, additional improvement No. 106, of 1853, on pat. No. 9579.
Samuel Cook, June 22, 1851, flour bolts.
Samuel Cook, March 9, 1852, flour bolts.
See 54,173, 1866, April 24, Kendrick.

And these defendants further answering say, that the said alleged improvements in the two said letters-patent

described prior to the time of the said alleged invention thereof by the said Wheeler and the said Reynolds respectively, had been invented, known, and used by Messrs. W. Trow and Co., of Madison, Indiana, at their flouring mill in said city, and by Samuel Cook, of Adams Basin, N. Y., and by B. T. Trimmer, of Rochester, N. Y., at Adams basin, Monroe county, N. Y., or by both said Cook and said Trimmer, at the grist mill known as the Hinckleyville Mill, near Adams Basin aforesaid, and by Andrew Hunter, of Quincy, Ill., at said city of Quincy, Ill., and by W. J. Fender, of Minneapolis, Minn., at said city of Minneapolis, and by Thomas Chester, of the firm of Thornton and Chester, of Buffalo, N. Y.; at the Globe Mills, Black Rock, N. Y.

And these defendants further answering, deny that they have done anything contrary to equity and good conscience, or tending to the injury of the complainants, without this, that any other matter or thing in said bill of complaint contained, and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to their knowledge or belief.

All of which matters and things these defendants are ready to aver, prove, and maintain, as this honorable court shall direct, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

JOHN H. CHASE,
WILLIAM RICHARDSON.

GEORGE B. SELDEN,
Solicitor for def'ts,
Rochester, N. Y.

—

U. S. Supreme Court.

COCHRANE *et al.*
vs.
DEENER *et al.*

District of Columbia, ss:

Geo. B. Selden being duly sworn deposes and says: That the annexed answer is a true copy of the answer filed in the clerk's office circuit court United States, at Utica, New York, in the case of Herr *et al. vs.* Chase and Rich-

ardson, in the rule day in November or December, 1875, the jurat being omitted.

GEO. B. SELDEN.

Subscribed and sworn to before me this 28th day of November, A. D. 1877.

JAS. H. McKENNEY,
Examiner.

Endorsement: U. S. circuit court, northern district of New York. Abraham H. Herr and others against John H. Chase and William Richardson. Copy answer, Geo. B. Selden, defendants' solicitor, Rochester, N. Y. Exhibit F.

JAMES S. WELCH, a witness in support of the motion, having been duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. What is your name, age, residence, and occupation?

A. My name is James S. Welch; I am rising 64 years of age, pretty close; residence, Georgetown, D. C.; and I am a flour manufacturer.

Q. 2. You were a partner of A. H. Herr at one time?

A. I was.

Q. 3. Do you remember the formation of an association under the Wheeler & Reynolds patents.

A. Yes, sir.

Q. 4. What became of the association?

A. I was interested in the Welch patents and the Wheeler & Reynods at the time the suit was in the lower court.

Q. 5. What became of your interest?

A. The Supreme Court of the United States, I suppose, took it away.

Q. 6. They took it away in a suit under the Welch and Cochrane patents?

A. Yes, sir.

Q. 7. An interference suit between the two, was it?

A. Yes, sir.

Q. 8. That practically ended your interest in those patents, did it not, so far as you understood?

A. Yes, sir; It was decided in Mr. Cochrane's favor, and I did not suppose I had anything more.

Q. 9. That suit was in the supreme court of the District of Columbia, was it not?

A. Yes, sir.

Q. 10. Was the suit brought by the owners of the Welch patents against the owners of the Cochrane patent, to declare the Cochrane void?

A. Yes, sir; that is my understanding of it.

Q. 11. Can you fix the date of that decision?

A. I cannot; but I have no doubt of it.

(Mr. Harding states that he proposes to give in evidence a certified copy of the record of the supreme court of the District of Columbia of the bill brought by the owners of the Welch patents against the owners of the Cochrane patent.)

Q. 12. Were suits brought under the Welch patents?

A. I think so.

Q. 13. Do you know what became of them?

A. I do not. I didn't pay any attention to it after the first trial. It was then put into the hands of Mr. Herr, Judge Merriman, and Mr. Cady.

Q. 14. You misunderstand me; I inquired as to suits under your Welch patents against parties in the west?

A. There was one suit, and may be others. I don't remember whether there was more than one or two.

Q. 16. Do you know what became of those suits?

A. They were withdrawn, I think.

Q. 17. Do you know why they were withdrawn?

A. No, sir; the fact is, I am not very familiar with them, not having attended to them at all.

Q. 18. Had you anything to do with the conduct of the case of Cochrane *et al.* vs. Deener *et al.* in the supreme court of the District of Columbia, or in the Supreme Court of the United States on appeal?

A. I had not.

Q. 19. Who attended to it?

A. Those gentlemen I have just named.

Q. 20. Who represented the owners of the patent?

A. Which patent?

Q. 21. The defendants, I mean.

A. Walter D. Davidge and Judge Merriman in the court below.

Q. 22. Did you hear Mr. Davidge argue the case in the Court below?

A. I did.

Q. 23. Were you anxious that he should argue the case in the Supreme Court of the United States on appeal?

A. I was.

Q. 24. Did you urge on any one that he should argue it?

A. Yes sir, I did.

Q. 25. Upon whom did you urge it?

A. Mr. Herr.

Q. 26. Why did you want Mr. Davidge to argue it in the Supreme Court of the United States?

A. Because he argued it in the lower court, and I was very well pleased with his argument; I also knew him very well and supposed he could handle it better.

Q. 27. Did you offer to pay any part of the expense of employing him, if he was employed?

A. I did.

Q. 28. To whom did you make this offer?

A. I made it through Mr. Herr.

Q. 29. You made the proposition to Mr. Herr, did you not?

A. Yes, sir.

Q. 30. How much did you offer to pay?

A. One-half of his fee.

Q. 31. What did you understand would be the fee that he would require?

A. I don't remember whether it was $500 or $1000.

Q. 32. It was one or the other, was it not?

A. I think it was.

Q. 33. And then it was that you offered to pay half if he was employed?

A. Yes, sir, I did.

Q. 34. Do you know why he was never employed?

A. No, I do not, except that Mr. Herr thought Mr. Cady was a better patent lawyer than Mr. Davidge, and he preferred Mr. Cady to Mr. Davidge; he paid Mr. Cady, and the understanding was that he was to take it

through the courts for an interest he had in it; he had an interest in Welch's patent.

Q. 35. You understood that the interest which Mr. Herr had in the patents was to be his pay for furnishing the funds to carry on the suit?

A. Yes, sir; that is my understanding of it.

Q. 36. And you understood that he was to have the say as to the payment of counsel; did you?

A. Well, he had the paying to do. That was his business. He got his interest from the Welches for that.

Q. 37. Do you know how much he paid Mr. Cady?

A. I do not.

Q. 38. Did you ever hear?

A. It seems to me I have heard that he paid him $500, may be more. I do not know. I would not be positive about it at all, but he paid Mr. Cady.

Q. 39. Do you know how much he paid Mr. Merriman?

A. I do not.

Q. 40. You never heard that?

A. No. He paid Merriman and Maloney by the week.

Q. 41. Did you ever hear how much?

A. I think it was twenty dollars a piece per week. I wont be positive about that. I did not give much attention to it. It was not my business.

Q. 42. Did Mr. Herr notify you or inform you in any way that he had made an arrangement with Mr. Cox as to paying a certain sum of money if the case was decided for the plaintiffs in the Supreme Court of the United States on appeal?

A. He did not.

Q. 43. When did you first hear that he had made an arrangement with Mr. Cox about the amount to be paid?

A. As well as I remember, it was about the winding up of the business here in the Supreme Court of the United States.

Q. 44. Do you mean about the time of the decision being rendered?

A. Yes; as well as I can remember, that was about the time, I think; probably after.

Q. 45. Did you pay your $250 and a note for $250?

A. Yes, sir.

Q. 46. Did you get a written receipt and license?

A. I got a receipt. I have not seen a license yet.

Q. 47. Were you to have a license?

A. I should think so.

Q. 48. Was that the understanding as Mr. Herr told you?

A. Yes, sir.

Q. 49. Will you bring or send a copy of the receipt with you here to-morrow?

A. Mr. Herr has got my receipt, or his lessees, Deener & Cissel, have my receipt that was given for me.

Q. 50. Did you pay the money yourself, or did Mr. Deener?

A. Mr. Deener paid it and charged it to me. He was leasing my mill.

Q. 51. Did you give your note for the other $250, or did he?

A. No, I did not give any note.

Q. 52. You understood that your mill was licensed for the remainder of the life of the patent, did you not?

A. Yes, sir.

Q. 53. Did you not think that you got out of it pretty well?

A. That is what I tried to do; after I found that we were beaten, I thought the best way was to make terms quick.

Q. 54. Did you suppose these terms were made after the result of the decision?

A. I think they were.

Q. 55. That was your understanding?

A. That is my recollection of it; if not after, mighty close on before; I think it was after, though perhaps not; Mr. Herr made the arrangement, and I did not know of it until some little time after; I didn't know any of these gentlemen except Colonel Mason and Mr. Cox.

Q. 56. Do you remember anything about instructions that Mr. Davidge was not to make a written argument in this case?

A. No.

Q. 57. You never heard of that?

A. I heard something said about it.

Q. 58. When was that?

A. That was before it came to this court, or soon after.

(Cross-examination waived by counsel in opposition to the motion.)

JAS. S. WELCH.

GEORGE W. CISSEL, a witness in support of the motion, having been duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. What is your name, age, residence and occupation?

A. My name is George W. Cissel; my age is forty-two; I live at 1110 Sixth St. N. W., Washington; I am a miller in Georgetown.

Q. 2. You are one of the firm of Deener, Cissel & Welch?

A. I am.

Q. 3. And were one of the defendants in the suit of Cochrane *et al. vs.* Deener *et al?*

A. I was.

Q. 4. When did you hear that an agreement had been entered into between Mr. Herr and Mr. Cox for the settlement of that matter?

A. I cannot say when I heard it—whether it was the time the money was paid, or whether I heard it before; I do not think I heard it before the money was to be paid; the way I knew it then was that we (Deener, Cissel & Welch) advanced the $250 for Mr. Welch; we would have owed him money on rent, and we advanced the $250 for him.

Q. 5. Did you take any interest or care, yourself, in the suit below or in the court above?

A. No, sir.

Q. 6. You never conferred with counsel about it in any way, did you?

A. No, sir.

Q. 7. Who had charge of it?

A. Mr. A. H. Herr and Mr. James S. Welch. We leased mills from them, and, of course, they were to protect our interest.

Q. 8. You took no interest and had no knowledge of

how the suit was going on from one time to another, did you?

A. No, sir; only what we heard.

Q. 9. As to the decision; that is all?

A. That is all.

Q. 10. Did you ever see any of the arguments of the counsel before they were filed?

A. I do not think I did.

Q. 11. Have you seen them since?

A. Yes, sir.

Q. 12. Do you know what fees were paid to counsel for arguing the case?

A. No, sir; I do not.

Q. 13. Who had the raising of the money to pay the counsel?

A. I do not know; I suppose Mr. Herr did; he seemed to be the moneyed man.

Q. 14. Did you know that if the suit was decided against you an injunction might possibly be awarded?

A. Yes, sir.

Q. 15. Did this annoy you?

A. He spoke to me about what we would do, and I told him that I did not think Deener, Cissel & Welch had anything to do with it; that I thought Herr and Welch had to protect our interest. I told him if he did not protect it, that Deener, Cissel & Welch would not only sue him for whatever judgment would be against us, but also for damages.

Q. 16. Would it have been a serious damage if your mills had been stopped under the injunction?

A. Yes, sir.

Q. 17. Can you give me any idea of the amount of the damage?

A. Our expenses for running those two mills were pretty heavy; we were paying $18,000 a year rent, and about $4,000 water rent besides—making about $22,000 that we paid for the use of the mills, without anything else.

Q. 18. This flour made under this patent process stands high in the market, does it not?

A. Yes, sir.

Q. 19. Has your flour a great reputation here?

A. Yes, sir; I believe it has.

Q. 20. Would it not have been a serious embarrassment or loss to you if you could not have made that grade of flour?

A. Yes, sir; I should think it would.

Q. 21. When you called Mr. Herr's attention to the subject of the injunction, what did he say?

A. He said of course he would protect our interest; that he did not intend it should cost us anything; that he would do all that could be done, and not only that, but if there was any judgment against us he would settle it. He said he felt it to be his duty to do it, and he would do it.

Q. 22. What difference was there in the prices between the new process flour and the old?

A. We only make about twenty per cent. of the process flour.

Q. 23. What is the difference in the prices of the two grades?

A. About a dollar a barrel.

Q. 24. How many stone did you run then?

A. I think there was nine run of stone in one mill and eleven in the other; I will not be sure.

Q. 25. How many have you now?

A. Nine. We have only one mill now.

Q. 26. What was the total product of flour of the two mills at that time—how many barrels?

A. I think we made last year, running the two mills together, eighty odd thousand barrels; I do not think it was quite ninety thousand.

Q. 27. How much of that was process flour?

A. I guess that year we made about twelve or fifteen per cent. of process flour.

Q. 28. Have you the receipt that was given to Mr. Welch at the time you paid that $500?

A. I think Mr. Herr gave a check.

Q. 29. Have you not a receipt?

A. I do not know whether we took a receipt; we have the check.

Q. 30. And it was given to Mr. Herr, was it?

A. Yes, sir; I think so.

Q. 31. Was it made to Mr. Herr's order?

A. I think so; I will not be sure.

Q. 32. It was given to him to pay?

A. Yes, sir.

Q. 33. He paid it on behalf of Mr. Welch?

A. Yes, sir.

Q. 34. Do you know where the receipt is that was given at the time that was paid?

A. No, sir; I do not.

Q. 35. A note was given; whose note was that?

A. I do not know whether Mr. Welch gave any note or not; there was to be a note given.

Q. 36. Your firm did not?

A. No, sir.

Q. 37. You paid $250 cash on account of Mr. Welch and gave it to Mr. Welch to pay over to Mr. Cox, or the party; you do not know whom it was paid to?

A. No, sir.

Q. 38. And you do not know between whom the settlement was made?

A. No, sir.

(Cross-examination waived by counsel in opposition to the motion.)

JAMES H. WELCH, a witness in support of the motion, having been duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. What is your name, age, residence, and occupation?

A. My name is James H. Welch; my age is thirty-six; residence, Georgetown, D. C.; I am a miller.

Q. 2. Were you one of the defendants in the suit of Cochrane *et al.*, *vs.* Deener *et al.*?

A. Yes, sir.

Q. 3. When did you first hear that a settlement had been made between Mr. Herr and the plaintiffs in that suit, by which you were to pay a certain sum of money?

A. I think it was after the decision of the Supreme Court of the United States on appeal, as well as my memory serves me.

Q. 4. How did you find it out; who told you?

A. I think it came through Mr. Deener, the senior member of our concern at that time.

Q. 5. Do you know how the money was paid?

A. It was paid by check from our concern, I think.

Q. 6. That is the check of Deener, Cissell & Welch?

A. Yes, sir.

Q. 6. It was given to Mr. Herr to pay, was it not?

A. Yes, sir; that is my recollection.

Q. 8. Do you know anything about a note being given at that time?

A. I think there was a note given.

Q. 9. Whose note was it?

A. I think it was a note drawn by Mr. Deener, and I think my father signed a note for the payment of this charge, whatever it was.

Q. 10. That was given to Mr. Herr with a check?

A. I think so.

Q. 11. Had you any knowledge about the conduct of this suit from time to time; did you take any part in its conduct or management?

A. No, sir; I was not directly interested in the management of the suit in any way.

Q. 12. Who had charge of the suit so far as you knew?

A. Mr. Herr had a power of attorny from us to conduct the suit.

Q. 13. Have you that power of attorney, or has Mr. Herr?

A. Mr. Herr has it?

Q. 14. Had you any fear of the result of that suit—I mean of the consequences to you and damage to the firm?

A. Yes; we were very apprehensive about it at one time.

Q. 15. To whom did you look in case it had gone against you?

A. We expected my father to be responsible to the firm of Deener, Cissell & Welch for any damages that might accrue from loss in the suit.

Q. 16. Was your father in partnership with Mr. Herr?

A. No, sir; not at that time.

Q. 17. There were two mills you were running at that time, one owned by Mr. Herr and one by your father, Mr. James S. Welch?

A. Yes, sir.

Q. 18. And then you looked to Mr. Herr and your

father to indemnify you in the respective mills in case you had been enjoined, and had suffered loss by damage, did you?

A. Yes, sir.

Q. 19. Would the injunction have been a serious inconvenience to you if the mill had been stopped from the use of this process?

A. Yes, sir.

Q. 30. Do you know anything about the bringing of suits upon the patents of Welch, Reynolds & Wheeler?

A. Yes, sir.

Q. 21. Do you know whether those suits were discontinued, and if so, why?

A. Yes, sir; those suits were discontinued, for the reason, as I understand from Mr. Herr, that the decision of this case would decide the matter either one way or the other, and finally terminate the patent matter, and he thought it was better for us to hold off in those suits until the decision of the Supreme Court was made, either one way or the other.

Q. 29. When did Mr. Herr tell you that?

A. I cannot remember exactly.

Q. 23. Can you fix the time when that was told to you?

A. No, sir; I cannot.

Q. 24. Do you remember an organization or association being formed in reference to the prosecution of suits under the Wheeler patents?

A. We determined to bring suits under those patents very soon after we bought.

Q. 25. Did you form an association to do that?

A. Among ourselves?

Q. 26. Yes.

A. Yes, sir.

Q. 27. Do you know what it was called?

A. Yes, sir; I think it was called the National Middlings Purifier Company, if I remember correctly.

Q. 28. Do you know what became of that association?

A. No, sir; it simply disorganized. That is about all I know about it.

Q. 29. Do you know what date that fell through?

A. It was about the time those suits were discontinued.

Q. 30. Do you know why it fell through?

when Mr. Herr visited the office he always closed the door after him, upon entering Judge Merriman's room.

(Question repeated).

A. As I said before, I have no recollection.

Q. 123. Is that as far as you are willing to swear in answer to the question?

A. I am not in the habit of swearing to anything positively upon which my memory does not serve me well.

Q. 124. Are you willing to swear that you never conferred with Mr. Merriman as to the terms or manner of the settlement of this case?

(Mr. Mason objects on behalf of the complainants to the course of this examination. It is in no degree relative to the issue that is being tried. It is not legitimate re-examination of a witness whose examination has once been completed, and to whom only two interrogatories relating to another matter were put on cross-examination. And certainly these complainants are not to be bound by conversations that may have occurred between the defendants and their counsel.)

(Counsel in support of the motion states that he does not press the question.)

JAMES A. MALONEY.

ABRAHAM H. HERR, a witness in support of the motion, having being duly sworn, testified as follows:

By Mr. HARDING:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Abraham H. Herr; my age is 63; my residence is Georgetown, D. C.; I am at present engaged in attending to my private affairs.

Q. 2. Were you the owner of certain mills, or part owner of certain mills, leased to Deener, Dissel & Welch, the defendants in the suit of Cochrane *et al. vs.* Dissel *et al.*?

A. I was the sole owner of the Pioneer Mills, leased to Deener, Cissell & Welch.

Q. 3. The last-named parties were the defendants in the suit of Cochrane *et al. vs.* Deener *et al.*, were they not?

A. Yes, sir.

Q. 4. What was the extent of those mills, and how many were there?

A. I had nine run of burrs—six on wheat, and the rest were generally used on middlings.

Q. 5. How many run of stone in all did the defendants in the suit of Cochrane *et al. vs.* Deener *et al.* run?

A. The other mill, I believe, has fourteen run—that is, the mill belonging to Mr. James S. Welch, called the Columbia Mill; that is, fourteen run, all told.

Q. 6. I do not understand what "all told" means?

A. A portion of them are used for wheat, and the rest for middlings.

Q. 7. That is the entire run?

A. The entire run.

Q. 8. What is the entire number of run of stones which the defendants in the suit of Cochrane *et al. vs.* Deener *et al.* were running?

A. That would be 23—14 and 9—to the best of my knowledge. I am not perfectly sure as to the Columbia Mills. I speak with positiveness as to my own. There are nine in my own, and I think fourteen in the other.

Q. 9. Who owns the mill which had the 14 run of stone in it?

A. James S. Welch.

Q. 10. Did he lease that mill to the defendants?

A. So I understand. I have no personal knowledge; that is, I never saw the lease.

Q. 11. Did you and Mr. James S. Welch guarantee the lessees against any loss by reason of infringement of the Cochrane patent?

A. I know nothing as to Mr. Welch. I did not when the lease was drawn.

Q. 12. Did you at any time have an understanding, or did Mr. Welch have an understanding, to your knowledge, to guarantee them against loss by reason of infringement of the Cochrane patent?

A. When this suit was brought of course the question came up as to who was liable, and I felt myself bound to defend them, having leased the property in good faith, including all the machinery which is claimed to be infringed.

Q. 13. Did Mr. J. S. Welch have an agreement of the same kind, to your knowledge?

A. Mr. J. S. Welch agreed with me after talking the matter over.

Q. 14. State to what effect?

A. We were to defend that suit.

Q. 15. Did you make any agreement as to how the expenses were to be paid?

A. There was an agreement existing between Mr. Welch and myself and the young Welches, dated 22 April, 1874.

Q. 16. Have you a copy of that agreement; can you state its contents or not?

A. I have not a copy here. The agreement was that we were to assist the sons of Mr. Welch, who owned this patent, in defending their rights. That is the amount of that agreement pecuniarily—to aid them in the expense.

Q. 17. Can you produce that agreement at the next session?

A. Yes, sir.

Mr. HARDING. Please produce it at the next session.

Q. 18. Were you and Mr. Welch to contribute equally?

A. Equally.

(Agreement subsequently produced, and copy attached marked Exhibit C.)

Q. 19. Did you employ counsel; if so, whom?

A. Judge Merriman was our counsel. In this suit do you refer to now, of Cochrane and others against Deener, Cissel, and Welch?

Mr. HARDING. Yes.

A. We had employed A. L Merriman & Co. prior to that, and continued Judge Merriman; and as an assistant, had engaged Mr. Latrobe, of Baltimore.

Q. 20. You refer to the suit of Cochrane *et al. vs.* Deener *et al.*?

A. Yes, sir.

Q 21. Had you previously commenced suits under patents owned by Welch and yourself?

A. Yes, sir; I do not claim that I ever owned any portion of the patents.

Q. 22. Did you not own some portion of the patents set up in the defendants' answer in the suit of Cochrane *et al. vs.* Deener *et al.*, to wit: The patents of Jesse B. Wheeler, April 14, 1863, re-issued Feb'y 23, 1875, No. 6,307; the patent of Ransom S. Reynolds, re-issued March 30, 1875,

No. 6,361, and the letters-patent of Edwin P. Welch, No. 13,593, re-issued April 1st, 1873, No. 5,346?

A. I hold an assignment of one of my sons who held an interest, and who assigned that interest as an inducement and compensation to me pecuniarily. The understanding was that just as soon as I was reimbursed the interest was to revert back to him.

Q. 23. What interest did you hold, and what was your son's name?

A. My son's name is Austin Herr; the interest I really cannot tell you without looking to the paper; it was $\frac{1}{16}$ or $\frac{3}{16}$, or something of that sort.

Q. 24. Can you produce the assignment?

A. I can do so.

Mr. HARDING. Please do so.

Q. 25. After this patent was assigned to you by your son, under the agreement referred to by you, did you institute suits under those patents or cause them to be instituted?

A. Yes, sir; I gave my consent, though I did not advise it.

Q. 26. Why did you not advise it?

A. I thought it might involve us in a good deal of litigation, and I preferred to wait until we could get a little more light on the subject.

Q. 27. Who furnished the money for that litigation?

A. Well, the intention was for it to be furnished by the firm of Herr & Welch; I believe the greater portion of it came out of my own pocket.

Q. 28. Who composed the firm of Herr & Welch?

A. Mr. James S. Welch and myself.

Q. 29. What interest had Mr. James S. Welch in those patents?

A. An equal interest with myself in those patents, I believe; and he felt an interest on account of his sons. He had four sons interested in it.

Q. 30. Who had the management of those suits after they were commenced under the Wheeler, Reynolds and Welch patents?

A. We had a formal organization; I forget now the style of that organization.

Q. 31. You mean a corporation, do you?

A. A corporation, yes; there was no legal form entered into; we were never incorporated.

Q. 32. Was it a partnership?

A. No, sir.

Q. 33. I am a little at a loss to understand what kind of an organization it was; was the paper in writing under which you were associated?

A. No, I do not think we ever entered into any kind of writing; we met in Mr. Welch's parlor, and we there agreed to form a company.

Q. 34. Who composed that company?

A. Mr. Welch and his sons.

Q. 35. Name all who composed the company?

A. Mr. James S. Welch and Mr. James S. Welch's sons, Rosia W., Edward P., James H., and Herbert P., who is now dead; I do not know of any others now.

Q. 36. Was Mr. James A. Maloney in this association?

A. It is possible; I am not sure; I think he was.

Q. 37. What was the purpose of this organization?

A. In the course of time we expected to form a corporation, but there was nothing binding—so considered; it was merely a nucleus or point to start from; Mr. James S. Welch was named as president; I want you to understand as to the import of that word "organization;" it was merely a starting point, and it was not considered that any of the parties were particularly bound or legally bound.

Q. 38. What was the contemplated purpose of this organization?

A. They expected to make some money out of it.

Q. 39. How did they expect to make money?

A. We looked upon those patents as controlling patents, and if the case was properly represented to the millers, we thought they would be willing to pay a reasonable amount.

Q. 40. Did you cause notices to be issued to the millers?

A. I think we sent out circulars.

Q. 41. Do you remember using the firm "National Middlings Purifier Company" in connection with those notices?

A. I am not sure as to the exact phraseology; I have a memorandum at home.

Q. 49. Have you one of the circulars?

A. Not here.

Mr. HARDING. Please produce one of the circulars to-morrow.

Q. 49. What became of that association; give the history of its rise and progress?

A. It fell through; there was never any money made under that patent, except $1,000 from Jones & Company of New York; this was under the Welch, and all the patents that our association owned; that was all the money ever received by that association; I was the treasurer; had a number of meetings.

Q. 44. When did it fall through?

A. I cannot give you the date.

Q. 45. When did the association you refer to take place?

A. The papers will show that.

Q. 46. How long after the date of the paper showing the association was it that the association fell through?

A. I cannot give you that exactly; it was some months; I do not think we met many times in that capacity.

Q. 47. Why did the association fall through?

A. Because we made no progress. We brought those suits referred to, but they were never tried, and there seemed to be no particular necessity of calling together.

Q. 49. Calling whom together?

A. These parties.

Q. 49. What particular member or officer of the association had charge and conduct of those suits?

A. We were all consulted whenever there was a move made. Mr. James S. Welch, Mr. J. A. Maloney, and Judge A. L. Merriman visited St. Louis at the holding of a meeting there by the millers' association. Before they left, I told them not to bring a suit. They went out for the purpose of meeting the millers and talking the matter over with them; and about the last word I said to them was, for God's sake not to bring any suits.

Q. 50. Who had charge of the bringing of those suits and the management, and who furnished the funds with which to commence and prosecute them?

A. They went out, as I stated, and they brought suits contrary to my personal wish. I had but a single vote in the company. They brought suits against Stannard & Co., and then they returned *via* Rochester, and brought two suits there against my express protest.

(Mr. Mason objects to this course of examination as being entirely irrelevant to this inquiry, and as calling upon the witness to testify concerning that which counsel have no right to inquire.)

Q. 51. Who brought those suits, and who furnished the money for those suits under those patents?

A. Those gentlemen brought the suits.

Q. 52. Who furnished the money to pay for the bringing of those suits?

A. Herr and Welch so agreed.

Q. 53. Did you not furnish all the money personally, yourself?

A. No, sir. I did not consider it in that light.

Q. 54. How much of the money did Mr. Welch actually furnish?

A. I furnished the money out of the firm of Herr and Welch's assets.

Q. 55. Did you not furnish the money out of your own individual pocket, in fact, to bring those suits?

A. I considered that I furnished it from the funds of Herr and Welch under that agreement.

Q. 56. Did Mr. Welch ever pay any money to you towards bringing those suits, or did he ever reimburse you for any money you had paid out for bringing those suits?

A. I think not. I took the money that I considered to be funds of the firm of Herr and Welch; but Mr. Welch invariably voted for the bringing of those suits. At this time the firm of Herr and Welch was in existence.

Q. 57. What became of these suits that were instituted?

A. They were dismissed by authority of all the parties concerned. I think I have a writing to that effect.

Q. 58. Will you please produce the writing referred to in your last answer?

A. I will.

Q. 59. Why was that writing entered into, and why were the suits discontinued?

A. Because we looked upon them as hopeless.

Q. 60. What made you come to the conclusion that they were hopeless?

A. We were advised so by our counsel. I think I have a writing to that effect at home; I am not sure.

Q. 61. Who was your counsel?

A. One was Judge Merriman.

Q. 62. Please state the names of the other counsel?

A. Mr. Walter D. Davidge; and H. B. Renwick, a very prominent expert in patents, of New York, also advised me.

Q. 63. Did Mr. Maloney give you any advice?

A. I do not know; I have not much confidence in Mr. Maloney's advice as a lawyer. I do not remember that he did.

Q. 64. Will you please produce those letters containing the opinions to which you have referred?

A. I do not think I have the letters, so far as Mr. Davidge and Mr. Renwick are concerned. I think I have Judge Merriman's opinion in writing.

Mr. HARDING. Please produce Judge Merriman's opinion.

WITNESS. I am not positive as to that; so many papers have passed through my hands that I cannot recollect.

Q. 65. Did you abandon your purpose of making a permanent organization, in consequence of these opinions?

A. That organization was permitted to die out; I cannot assign any particular reason but because we were not successful.

Q. 66. Can you fix the date of these opinions and agreements?

A. I cannot; I reckon you can get at that exactly by the paper I propose to furnish, showing Judge Merriman's advice and opinion in the matter. It was about that date.

Q. 67. How long after the agreement was it that you discontinued the suits?

A. About the same time. I think he ordered the discontinuance at once under the agreement. You mean the opinion of Judge Merriman?

Q. 68. No, I mean your agreement to discontinue the suits.

A. It was about the same time, I reckon; I cannot give you exact dates.

Q. 69. And the opinion of Mr. Merriman was about the time the suits were dismissed, was it?

A. Yes, sir; about that time.

Q. 70. Can you give the name of the party in Rochester who was sued?

A. I really cannot give you the name now.

Q. 71. Have you any memorandum which will enable you to give the names of those suits?

A. I have not.

Q. 72. Have you any memorandum at home?

A. I think Mr. Merriman would know; Mr. Selden was counsel in the case, and he knows.

(It is admitted by counsel on both sides, on the information of Mr. Selden, that the suits were entitled Abraham H. Herr, James S. Welch, Edward P. Welch, Rosia W. Welch, James H. Welch, James A. Maloney, and James S. Welch, administrators of Robert P. Welch, deceased, *vs.* John H. Chase and William Richardson; and the same complainants *vs.* Mosely and Motley.)

Q. 73. Who had charge of the defence of the suit of Cochrane *et al. vs.* Deener *et al.;* I mean what person specially took charge of that case on behalf of the defendants in the supreme court of the District of Columbia?

A. All the parties concerned seemed to contribute in managing that—all the Welches, including the old gentleman and myself.

Q. 74. Who was the counsel in the case?

A. Judge Merriman was the counsel we had before this suit was entered, and we requested him to employ Mr. Latrobe, of Baltimore, to assist him.

Q. 75. Did you employ James A. Maloney?

A. A. L. Merriman & Co. was the firm.

Q. 76. Did you understand that James A. Maloney was employed as a member of that firm?

A. I understood that he was embraced in the firm.

Q. 77. Did he take part in the preparation of the suit?

A. Yes, sir.

Q. 78. Did you, yourself, take any special part in reference to the suit any more than any other member of the association?

A. We were all there. Perhaps I was there more frequently than the others, but we were all present during the taking of the depositions. So far as I can recollect, I took no steps without conferring with them and getting their

consent. We were generally ruled by the majority of the parties interested.

Q. 79. Then you think that you took no more special part in the defence than any other member?

A. I stated that I was there more frequently, perhaps, than any other.

Q. 80. Did Mr. Latrobe take no part in this suit at any time?

A. Not as far as I know. Not when the depositions were taken. I think Judge Merriman had several conferences with him upon the subject; at least I was led to infer that.

Q. 81. Did you pay Mr. Latrobe anything?

A. I gave him $250, I think; that is my impression. May be it was $500. That was not in regard to this case. We employed him before the trial came on in reference to other patents.

Q. 82. Did you mean that he was paid in this case of Cochrane *et al. vs.* Deener *et al.*?

A. That was our instruction to Judge Merriman, to employ him, and it was our understanding. His name you will find on the record in the court below.

Q. 83. Did you employ Mr. Davidge to argue this case in the supreme court of the District of Columbia?

A. When the time came on for the hearing of this case, or within a week or ten days of it, Mr. Latrobe notified Judge Merriman that he would not be present, so Judge Merriman informed us. We then employed Mr. Davidge to take his place.

Q. 84. What was the expense incurred in the argument of that case in the supreme court of the District of Columbia?

A. Do you want me to tell you what we paid Mr. Davidge?

Q. 85. Yes.

A. The agreement was $500.

Q. 86. What did you pay Mr. Merriman?

A. We were under an agreement with Mr. Merriman to pay him $20 a week when this case before the United States court came on. Do you mean in regard to the first trial?

Q. 87. Yes.

A. The firm of Herr & Welch paid A. L. Merriman & Co. at the rate of $40 a week.

Q. 88. At the time the suit of Cochrane *et al. vs.* Deener *et al.* commenced, the firm of A. L. Merriman & Co. were under your employment at the rate of $40 a week?

A. Yes, sir.

Q. 89. How long did that arrangement continue?

A. It continued until Mr. Maloney withdrew from the firm; I cannot give you the date of that. Then it continued at the rate of $20 a week. We continued to pay Judge Merriman $20.00 a week.

Q. 90. How long did you continue to pay Judge Merriman $20 a week?

A. We were under that agreement when the decision was made in the supreme court of the District of Columbia.

Q. 91. How long after that did you continue to pay him that money?

A. I cannot tell you, but it was some time before the arguments were written. I asked Judge Merriman how long it would take him to write the argument, and he stated that he thought he could do it in two or three days. (I am now referring to his argument on appeal in the Supreme Court of the United States.) I said: Now, Judge, suppose I pay you $100; that will be much better pay than what we have been giving you;" he agreed to take it.

Q. 92. Did he continue to receive the $20.00 a week after the decision of the supreme court of the District of Columbia and prior to the conversation about the argument in the Supreme Court of the United States?

A. That is my recollection; I am not positive.

Q. 93. Do I understand you that immediately after the decision in the supreme court of the District of Columbia you stopped paying him $20.00 a week?

A. My books and receipts will show. I think I paid him $20 a week up to the time of the writing of this argument for the Supreme Court of the United States.

Q. 94. Did you then propose to him to discontinue the further payment of $20 a week, and pay him the sum of $100?

A. I asked him how long it would take, and he told me

two or three days; that would not have been a week, I thought to myself, and I made him a proposition, and I offered him $100, and he accepted it. It was not to be paid in cash down; I did pay it, however, very soon.

Q. 95. Was it understood that the payments of the $20 a week were to end then, if they had not ended before?

A. I understood that was to be his final charge.

Q. 96. Will you please refer to your books and tell when you stopped paying him the $20 a week?

A. I will.

Q. 97. Did this $20 a week cover Mr. Merriman's services in connection with the suit of Cochrane *et. al. vs.* Deener *et. al.* as well as the suit under the other patents which your association owned?

A. It embraced all his charges.

Q. 98. Why, at the time you agreed to pay him this $100, did you terminate the $20 weekly stipend, in view of the fact that you still owned your interest in these other patents under which you had been paying him at the rate of $20 a week before the suit of Cochrane *et. al. vs.* Deener *et. al.* was instituted?

A. He agreed to take that as compensation in full, and I hold his receipt, I think, to that effect.

Q. 99. Why did you terminate or desire to terminate his relations, in view of your other patents, of which you and your associates were the owners?

A. I had lost faith, and did not intend, so far as I was concerned, to prosecute the matter any further.

Q. 100. What made you lose faith at that time or before?

A. I was advised by these legal gentlemen to abandon the suits, and I was advised by H. B. Renwick, of New York.

Q. 101. Did you take any steps to procure associate counsel to argue the case with Mr. Merriman in the Supreme Court of the United States, on the hearing of the appeal?

A. Yes, sir.

Q. 102. What steps did you take?

A. I applied to two parties representing prominent patents, and asked them to assist us in this matter; that I thought they were interested. They both declined. One of them advised me to employ Judge Cady.

Q. 103. Why did you apply to those parties to assist you, and why did they decline?

A. I cannot tell you why they declined. I applied to them for several reasons, and my purpose was to defeat the suit of Cochrane, if I could; the other reason, I suppose, was that I wanted them to bear some of the expenses.

Q. 104. Who were the parties?

A. Hill & Ellsworth represented Whittemore's patent, which was considered a prominent patent; Bramhall & Ager represented the Metropolitan Middlings Purifier Company, who owned the Barter patents.

Q. 105. Is that Wilson Ager?

A. That is the man.

Q. 106. What did Wilson Ager say to you when you applied to him?

A. I did not apply to him. I do not remember that I said anything to him about it. I spoke to Mr. Bramhall, who was president of the company, I think.

Q. 107. What did he say to you when you spoke to him about it?

A. He recommended Judge Cady?

Q. 108. What did he say about contributing to help you with the defence?

A. He declined.

Q. 109. What reason did he give?

A. I do not remember that he gave any particular reason.

Q. 110. Did Hill & Ellsworth give you any reason for declining?

A. I think they intimated that their client was not in a condition to pay; I am not sure. I know they did subsequently, if they did not then.

Q. 111. Were you present in the supreme court of the District of Columbia when the case was argued there on the first hearing?

A. Yes; I think I was there nearly all the time. I did not hear all the arguments, but I was there most of the time.

Q. 112. Did you hear Mr. Davidge argue the case?

A. Yes, sir.

Q. 113. Did you apply to Mr. Davidge to argue the case on appeal in the Supreme Court of the United States?

A. Yes, sir.

Q. 114. What did he say to you?

A. Mr. Davidge declined to undertake the case unless he was permitted to argue it orally.

Q. 115. Why did he say the case should be argued orally, or not by him?

A. I do not remember that he gave any reason.

Q. 116. Did he not tell you that the proper presentation of the case to the court demanded its oral argument?

A. He may have said something to that effect, but I do not remember.

Q. 117. Do you not think he did?

A. No, sir; I do not. I do not remember it. The other parties interested had several conferences with him upon the subject. I had very little talk with him about it.

Q. 118. Did not some of the defendants in the suit of Cochrane *et al. vs.* Deener *et al.* advise or urge you to employ Mr. Davidge?

A. Yes, sir.

Q. 119. Did they not advise you to allow him to make an oral argument?

A. I have a written paper instructing me not to employ Mr. Davidge, but to re-employ Judge Merriman.

Q. 120. Where is that written paper?

A. I have it at home.

Q. 121. Who signed it?

A. I think it was signed by all.

Q. 122. What reason was given?

A. I told them—and they were aware of it—that there was a stipulation between the counsel before the case went to the supreme court of the District of Columbia that the case should be appealed, and should be argued in writing or print. I considered that we were in honor bound to carry that agreement out, whether we were or not legally bound to do so. Mr. Davidge was not willing to undertake the case under the circumstances. Then I was requested by those gentlemen to re-engage Mr. Merriman, who had been dismissed for a short period.

Q. 123. What were the circumstances attending the dismissal of Mr. Merriman for this short period, and what was the reason therefor?

A. The object was to stop the expense, and we were in

hopes that we would get Mr. Davidge; that is all. The expenses had been heavy.

Q. 124. I suppose you stopped this expense shortly after the decision in the court below, did you not?

A. I expect my books will show.

Q. 125. Is not that your impression?

A. I do not remember.

Q. 126. By dismissal you mean that you cut off his $20 weekly stipend; is that what you mean?

A. That was the idea.

Q. 127. Was it discussed among you as to accepting Mr. Davidge's advice of having an oral argument instead of a written one?

A. That is my recollection.

Q. 128. Did you state to Mr. Cochrane or any of the plaintiffs in that suit, or their counsel, that you were disposed, under the advice of Mr. Davidge, to have an oral argument of the case?

A. Yes, sir; I did; I had that conversation with one of the parties.

Q. 129. To which one of the parties did you state that the defendants were disposed to have an oral argument in the Supreme Court, under the advice of Mr. Davidge?

A. To Mr. Walter S. Cox, I think.

Q. 130. What did Mr. Cox say to you?

A. He expressed to me his determination to enforce the stipulation.

Q. 131. Did you ever apply to Mr. Cox to pool your patents and his?

A. I did mention the matter to him.

Q. 132. Under what circumstances, and when?

A. I cannot tell you whether it was before the trial or not; I spoke several times to him—perhaps twice, and he rejected all propositions.

Q. 133. If you did speak to him in reference to pooling your patents and his before the argument of the case in the Supreme Court of the United States, what motive did you give to him for that pooling?

A. The reason I urged was that I was in hopes that by pooling we might make something out of our patents.

Q. 134. What benefit did you say to him pooling would be?

A. I do not remember that I ever represented that we would reap any particular benefit; I thought it would benefit the whole; I thought we might make it a profitable thing.

Q. 135. How did you suppose he would be benefited if the patents were pooled?

A. My impression was that if we would pool eight or ten of the principal patents we might present such a front as to induce the millers to give a reasonable compensation, and, in that way, the Welch patents would derive some benefit, but if we lost it we would not get anything.

Q. 136. In case the patents were pooled, did you give him to understand that you would go ahead and try to break the Cochrane patent?

A. My idea was that he would withdraw the suit—would not allow it to come to a decision, and, in that case, I was in hopes we would derive some benefit; but he refused peremptorily to make any conditions.

Q. 137. Did he state any reason for refusing?

A. Yes, sir; I think I gave that in a paper that can be produced.

Q. 138. Please state the reasons that he gave you?

A. If there was any taint discovered by the Supreme Court of the United States—this may not be in his language—if there was any taint discovered, or any collusion, the case would be dismissed; consequently he would not hear to any proposition, except to have the case tried in a fair and square manner; and I will say that on several occasions he told me to employ the best counsel I could.

Q. 139. After he had refused to make this agreement as to pooling the patents for the reason stated by him, did he make a proposition to you?

A. No, sir; I made the proposition.

Q. 140. What proposition did you make to him after he made that reply to you about the tainting?

A. When Mr. Mason opened the case, I remember that he stated to the court—I speak now of the supreme court of the District of Columbia—that his object was not to exact a large amount from us, but it was mainly to test—

(Mr. Harding interrupts the witness, and objects to this statement of the witness, and says: My question is what

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IN THE

Supreme Court of United States.

GEORGE SESSIONS, Plaintiff in Error,

vs.

FRANCIS M. JOHNSON ET AL.,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

R. M. MORSE, JR.,

GEO. W. MORSE,

Counsel for Defendants in Error.

WASHINGTON:

JOSEPH L. PEARSON, PRINTER,

Corner of 9th and D streets.

1877.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1876.

GEORGE SESSIONS, PLAINTIFF IN ERROR,

vs.

FRANCIS M. JOHNSON ET AL., DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

This action was brought by the defendants in error, assignees of Kane, Sprague & Co., bankrupts, against the plaintiff in error to recover the value of three promissory notes signed by Nichols & Johnson, and of two promissory notes signed by Henry W. Snow, the property of the bankrupts, which it was alleged were delivered to Sessions within six months before the commencement of proceedings in bankruptcy, the said Sessions having reasonable cause to believe that said Kane, Sprague & Co. were insolvent. It was further alleged that said payment was made with a view to prevent said property from coming to the assignees in bankruptcy, to prevent the same from being distributed under the bankrupt law, and to delay, impede, and hinder the operation of said law, and to evade the provisions of the same.

The verdict was for the assignees, $2,781. Judgment was entered on the verdict for $2,786.56 and costs, and a

writ of error to the district court based on bill of exceptions by plaintiff in error to the instructions of the district judge to the jury at the trial; the circuit court (Shepley, J.) in an opinion, of which a copy is annexed, affirmed the judgment of the district court, with interest. The plaintiff in error now brings the bill of exceptions before this court on writ of error to the circuit court.

It appeared at the trial that, April 5, 1870, Kane, Sprague & Co. made a mortgage upon their stock, tools, fixtures, and machinery, to W. W. Sprague, to secure him as indorser for them.

April 13, 1870, W. W. Sprague assigned this mortgage to Sessions as security for a debt due from W. W. Sprague to Sessions.

October 4, 1870, Kane, Sprague & Co. made a mortgage of the same and additional property to E. A. Goodnow for $4,000, which Goodnow paid to W. W. Sprague as agent for Kane, Sprague & Co., and which was used by him in part in payment of three notes given by Kane, Sprague & Co., upon which W. W. Sprague and Goodnow were indorsers.

October 12, 1870, Kane, Sprague & Co. sold the property covered by both mortgages to Nichols & Johnson, and received in payment their notes and those of Henry W. Snow to the amount of $6,000, which they divided between Sessions and Goodnow (who released their mortgages) as follows: $2,444.40 to Sessions, and $3,556.60 to Goodnow.

November 2, 1870, proceedings in bankruptcy against Kane, Sprague & Co. were begun.

Subsequently the assignees sued Goodnow to recover the value of the property covered by his mortgage, and by agreement judgment was entered in their favor for $4,000, interest and costs, which judgment was satisfied by Goodnow.

They also brought a suit to recover for the preference alleged to have been obtained by him in the payment of the notes of Kane, Sprague & Co., upon which he was liable as

indorser, (and not for the money received by him in payment of the notes taken in payment for the goods, as incorrectly stated by his honor Judge Shepley.) This suit was settled by the payment of $2,000, and a release given by the assignees of all their claims against him.

The assignees did not question the validity of the mortgage from Kane, Sprague & Co. to W. W. Sprague. But as the condition of the mortgage was to secure W. W. Sprague as indorser, and as the case finds that Sessions was unable to satisfy the jury that W. W. Sprague had in fact taken up any paper upon which he was so liable, it was evident that Sessions derived no right by virtue of his mortgage to the proceeds of the property which were paid him.

It was simply a case in which the bankrupts, on the eve of bankruptcy, had, without consideration, placed in Sessions' possession a sum of money which belonged to their creditors.

The plaintiff in error asked the court to rule in effect (1) that the assigness could not recover of Sessions in consequence of the judgment against Goodnow, and of his satisfaction of the same; (2) that the damages could not in any event exceed the difference between $4,000, the amount paid by Goodnow, and the value of the property.

The court properly declined to give these instructions, and submitted to the jury the question whether the assignees in the settlement with Goodnow, received satisfaction for the whole *property* sold by Kane, Sprague & Co., or only for that portion of the proceeds which was actually received by Goodnow, and ruled that the second suit against Goodnow and the settlement of it were immaterial in this suit.

Both of these rulings, it is submitted, were right.

Points and Authorities.

I.

The judgment against Goodnow and satisfaction thereof were not a bar to this suit.

Goodnow and Sessions were not joint tort-feasors.

The claim of the assignees was that each of them had received a distinct, definite sum, being the proceeds of property of the bankrupts. It was immaterial that in the declaration the entire property had been described. It was competent to consider all the facts for the purpose of determining whether the Goodnow settlement embraced, or was intended to embrace, complete compensation for the property. Brown vs. City of Cambridge, 3 Allen, 474, was a case where a release of one joint tort-feasor was held to discharge another.

Even in a suit between the same parties evidence as to what was covered by this judgment and settlement would be competent, and the former judgment would not be a bar unless it appeared that the suit was for the same cause of action, and that the merits of the case were passed upon.—(Eastman vs. Cooper, 15 Rich., 276; Sawyer vs. Woodbury, 7 Gray, 499; Burton vs. Shannon, 99 Mass., 200; Packet Co. vs. Sickles, 5 Wall., 580.)

A fortiori in the case of a suit against a third person.—(Prim vs. West. R. R. Corp., 102 Mass., 283.)

The second suit against Goodnow was for a wholly different cause of action. Whether or not it could have been maintained is immaterial in this action. The fact that Goodnow paid $2,000 in settlement has no bearing either on the liability of Sessions or the amount of the judgment against him.

II.

If Sessions was liable at all it was for the amount that he received, to wit, $2,444.40 and interest, and for the reasons above stated it was immaterial what amounts had been recovered of Goodnow, except so far as under the instructions of the court the jury were justified in regarding them for the purpose of determining whether the settlement with Goodnow covered compensation for all the property.

The following is the opinion of the circuit court affirming the judgment of the district court in favor of the defendants in error:

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

October Term, 1873, to wit, January 1st, 1874.

George Sessions, Plaintiff in Error,
vs.
Francis M. Johnson et al.

SHEPLEY, *J.*—This is a writ of error to the District Court for the District of Massachusetts, based upon a bill of exceptions to the instructions of the district judge to the jury in the trial of the cause.

The facts in this case are that, April 5, 1870, Kane, Sprague & Co. made a mortgage upon their stock, tools, fixtures, and machinery to Welcome W. Sprague, to secure him as indorser for them. April 13, 1870, Welcome W. Sprague, being indebted to Sessions, assigned the Kane, Sprague & Co. mortgage to Sessions for his security. October 4, 1870, Kane, Sprague & Co. made a second mortgage on the same property and other additional property to one Goodnow, to secure Goodnow for the sum of four thousand dollars. Goodnow and Welcome W. Sprague being on that day liable as indorsers on three notes amounting to upwards of $2,300, Goodnow advanced this sum of $4,000 to Welcome W. Sprague, with which he took up these notes. On the twelfth day of October, Kane, Sprague & Co. sold the mortgaged property for $6,000, taking notes in payment, which they disposed of by giving $3,555.60 for a release of his mortgage to Goodnow, and $2,444.40 to Sessions for a release of his mortgage.

Proceedings in bankruptcy were commenced against Kane, Sprague & Co., November 2, 1870, and they were duly adjudicated bankrupts, and defendants in error appointed their assignees. After their appointment the assignees brought an action against Goodnow to recover back the value of said property, which action was settled by a compromise, and the assignees recovered judgment against Goodnow for $4,000, which judgment was satisfied by Goodnow. Subsequently the assignees brought another action against Goodnow to recover the money received by him in payment of the notes taken by him in payment for the goods, which action was compromised by the payment of $2,000. The assignees thereupon executed to Goodnow

a general release of all claims and demands which they as assignees had or might have against him.

Sessions was not a creditor of Kane, Sprague & Co. This action is brought to recover back the money paid to Sessions within six months before the filing of the petition against Kane, Sprague & Co., the bankrupts, under allegations that it was paid in fraud of the bankrupt act and to secure Sessions for his indorsements for Welcome W. Sprague, Sessions having reasonable cause to believe Kane, Sprague & Co. to be insolvent, and that the payment was made to prevent the property from coming to their assignees in bankruptcy, and with a view to prevent its distribution under the bankrupt act, and to impede the operation of the bankrupt law and evade the provisions of the same.

The first point relied upon by the plaintiffs in error is, that the mortgage made by Kane, Sprague & Co. was valid in its origin, being made to secure future advances, and that when it was assigned by Welcome W. Sprague to Sessions, Welcome W. being indebted to Sessions, the holder of the mortgage could only be compelled to discharge it when the liability of Welcome W. Sprague for the mortgagors ceased. This position of the plaintiffs in error is well taken, but the bill of exceptions in the case does not show that any instructions were given by the presiding judge contrary to this view of the law. The statement of facts in the bill of exceptions shows only "that the plaintiffs claimed that as the mortgage to W. W. Sprague assigned to Sessions was conditioned to indemnify said W. W. Sprague for indorsing for Kane, Sprague & Co., it was incumbent on the defendants to show that the said Kane, Sprague & Co. were indebted to W. W. Sprague for moneys advanced to take up paper which he had indorsed, which the said Sessions was unable to do to the satisfaction of the jury." Under what instructions the jury acted in failing to be satisfied of this fact is not stated, and the presumption, in the absence of any evidence to the contrary, is that they were rightly instructed on this branch of the case. No facts appear on the record to justify any different conclusion.

The instructions given by the presiding judge to the jury in reference to the effect of the prior judgment against Goodnow and the satisfaction by him, state the law correctly: "It is a question of fact for the jury upon the record and other evidence in the case, whether for the illegal

sale of the stock and machinery on the twelfth of October, or for the proceeds of that sale, the assignees have once received full satisfaction from Goodnow. If they have, they can recover nothing of this defendant." This restriction, which might at first seem to make the decision turn on the question of full satisfaction or full payment of the claim, is qualified by what follows, when the language of the charge is: "This does not depend upon the question whether the sum or sums of money received from Goodnow amounted to more or less than he ought to have paid, or than the goods were worth, though the amount received may be evidence upon the question, but the point to be decided is whether the assignees have received what they have accepted, or what the law requires them to accept as satisfaction."

The defendant in this case was not a party to the suit against Goodnow, and as there was no joint tort committed by Goodnow and the defendant, the jury were rightfully instructed that no technical bar arises out of a judgment against one, unless it was really recovered for the whole injury severally done by both. Judgment and satisfaction against one co-trespasser is undoubtedly a bar to an action against another co-trespasser. It is an established principle of law that several actions may be brought for a joint trespass, and they may be prosecuted until the amount of the damages is settled by a verdict. But as the party injured can have but one satisfaction, he may make his election *de melioribus damnis*, and having made it he is concluded by it.—(Sir John Heydon's Case, 11 Co., 50; White vs. Philbrick, 5 Greenleaf, 147; Brown vs. City of Cambridge, 3 Allen, 474.)

The case finds that Kane, Sprague & Co. divided the proceeds of the goods between Goodnow and the defendant in certain proportions, and the jury were rightly instructed that if they found that the compromise with Goodnow was that judgment should be entered against him for his portion, then the plaintiff can recover against Sessions his proportion of the proceeds. The judgment in the former action, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded, but when it is presented as testimony in another suit, and especially when, as in this case, the suit is against a different party, the inquiry is competent whether the same issue has been tried and settled by it.—(Packet Co. vs.

Sickles et al., 24 Howard, 333; S. C., 5 Wall., 580; Merriam vs. Whittemore, 5 Gray, 316; Hughes vs. Alexander, 5 Duer, 488; Sawyer vs. Woodbury, 7 Gray, 499; Matheson vs. Grant, 2 How., 263.)

The proceedings in the second suit, or threatened suit, against Goodnow have no connection with this case. It appears that the assignees, having once collected from Goodnow the proportions of the proceeds of the sale of the mortgaged goods received by him in the notes given for the purchase, afterwards succeeded in collecting from him the amount, or a portion of it, which he received on payment of the notes. Although he does not appear to have been justly liable, having once paid his proportion of the proceeds of the sale of the goods, the fact that he has twice satisfied the claim for his proportion, does not relieve Sessions from liability for the amount received by him.

R. M. MORSE, JR.,
GEO. W. MORSE,
Counsel for Defendant in Error.

Dec 13-1877
Standing-

SUPREME COURT OF THE UNITED STATES

No. 744 of October Term, 1876.

WILLIAM F. COCHRANE et al., *Appellants*,

vs.

JOSIAH W. DEENER et al.

Motion to Set Aside Decree and to Dismiss Appeal.

TESTIMONY BEFORE THE EXAMINER.

Dmy
Dec 15 1877
Denied

Supreme Court of the United States.

No. 744 of October Term, 1876.

WILLIAM F. COCHRANE et al., *Appellants*,

vs.

JOSIAH W. DEENER et al.

Motion to Set Aside Decree and to Dismiss Appeal.

TESTIMONY BEFORE THE EXAMINER.

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Supreme Court of the United States.

October Term, 1877.

No. 744 *of Oct. T.* 1876.

WILLIAM F. COCHRANE ET AL.,
APPELLANTS,
vs.
JOSIAH W. DEENER ET AL.

Motion to set aside decree.

Leave is granted to the parties to take depositions in support of and against this motion; and in doing so they will be governed by Equity Rule No. 67, as far as the same may be applicable.

Such further orders as shall appear to be necessary to speed the cause will be made upon the application of the parties, or either of them, in that behalf.

19th November, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 744 of October Term, 1876.

WILLIAM F. COCHRANE *et al.*, *Appellants*,
vs.
JOSIAH W. DEENER *et al.*

Mr. Rodney Mason moved the court for the appointment of an Examiner to take and report the testimony in this cause, in pursuance of the order granted this date; where-

upon it is now here ordered that James H. McKenney be, and he is hereby, appointed Examiner to take and report the testimony.

19th November, 1877.

True copy. Test:

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 744 of October Term, 1876.

WILLIAM F. COCHRANE & *al.*, *App'ts*,
vs.
JOSIAH W. DEENER & *al.*

Appeal from the supreme court of the District of Columbia.

Depositions of witnesses, produced, sworn, and examined before James H. McKenney, special examiner, by virtue of an order of the Supreme Court of the United States, dated the nineteenth day of November, A. D 1877. On the motion filed by Mr. George Harding in behalf of Cadwalader C. Washburne and others, to vacate the decree entered in the above-entitled cause, and to dismiss the appeal.

WASHINGTON, D. C.,
Friday, November 23, A. D. 1877, 10 o'clock A. M.

Notice having been served on Mr. Rodney Mason, of counsel for William F. Cochrane and others, that testimony would be taken in support of the motion, before said examiner, at the office of the clerk of the Supreme Court of the United States, at the Capitol, in the city of Washington, this day, at 10 o'clock A. M., said examination was formally opened in accordance with said notice; the following counsel being present, viz:

Mr. F. N. Judson, in support of the motion.

Examination adjourned by consent until Tuesday, the 27th inst., at 10 o'clock A. M.

10 o'clock A. M., *November 27th*, 1877.

Met pursuant to adjournment.

Present: Messrs. George Harding and F. N. Judson, counsel on behalf of the motion; Messrs. Rodney Mason and Walter S. Cox, counsel in opposition thereto.

Thereupon, James A. Maloney, Abraham H. Herr, James S. Welch, George W. Cissell, James H. Welch, Howard C. Cady, Edward P. Welch, and R. W. Welch, witnesses produced in support of the motion, were duly sworn, and testified as follows:

Testimony in Support of the Motion.

Witnesses examined by Mr. George Harding.

JAMES A. MALONEY, a witness in support of the motion, having been duly sworn, testified as follows:

Direct Examination.

By Mr. HARDING:

Question 1. What is your name, age, residence, and occupation?

Answer. My name is James A. Maloney; I am of lawful age; a resident of Georgetown, D. C.; by profession, a lawyer.

Q. 2. What relation did you occupy to the suit of William F. Cochrane *et al. vs.* Josiah W. Deener *et al.*?

A. The relation of co-owner in the patents set up by the defendants.

Q. 3. In what patents?

A. The patents granted to A. P. Welch, November 26, 1871, February 18, 1872, and the patents of Jesse B. Wheeler and Ransom S. Reynolds.

Q. 4. Were suits instituted upon those patents?

A. Yes, sir.

Q. 5. What became of those suits?

A. In a great many instances they were dismissed.

Q. 6. When were they dismissed?

A. That I cannot tell you.

Q. 7. Why were they dismissed?

A. That I cannot answer.

Q. 8. Why can you not answer?

A. Because I was not counsel in the case.

Q. 9. Were you a co-plaintiff?

A. I was.

Q. 10. Did you not know why the suits in which you were co-plaintiff were discontinued?

A. Some of the co-owners stated to me that Mr. Herr thought it was too expensive.

Q. 11. What had Mr. Herr to do with those suits?

A. He was a co-owner.

Q. 12. Who else were co-owners?

A. James S. Welch, Rosia W. Welch, James H. Welch, E. P. Welch, H. P. Welch, (since deceased,) and myself.

Q. 13. Who had charge of the conduct of those suits?

A. A. L. Merriman.

Q. 14. Was he interested in these patents?

A. Nothing more than as counsel.

Q. 15. You were asked what relation you had to the suit of Cochrane *et al. vs.* Deener *et al.;* did you not act as attorney, solicitor, or counsel in connection with that suit?

A. I did not act as attorney, for the reason that I had not then been admitted to the bar.

Q. 16. Did you act in any professional relation to that case?

A. Possibly as expert in that particular branch of industry; and I did examine some of the witnesses.

Q. 17. In what capacity did you examine the witnesses?

A. As a co-owner.

Q. 18. Co-owner of what?

A. Of the patent before mentioned.

Q. 19. When did you become an attorney?

A. I think on the 16th day of May, 1876, or thereabouts.

Q. 20. After you became an attorney, did you still take any part in connection with those suits?

A. I think I was out of the case at that time.

Q. 21. In what way had your relation changed to the case before that time and after it?

A. That question to me is an ambiguous one.

Q. 22. You say you were out of the case at that time; what do you mean by that expression?

A. I mean that I had nothing to do with it.

Q. 23. Do you mean to imply that you were in the case before that time?

A. As a co-owner, yes.

Q. 24. Then why do you say you were out of it at that time?

A. Because my interest changed hands.

Q. 25. In what way?

A. It was conveyed in trust.

Q. 26. To whom?

A. To A. H. Herr.

Q. 27. What was the object of the trust?

A. To raise money.

Q. 28. Where is that interest now?

A. In A. H. Herr.

Q. 29. Has it been there ever since?

A. It has.

Q. 30. What witnesses did you examine in that case of Cochrane *et al. vs.* Deener *et al.*?

A. I cross-examined Edward S. Renwick.

Q. 31. Is that all the witness you examined?

A. I examined Newton S. Crawford, the greater portion of his testimony, and William Warder; and I also attended the examination of Warder and Ross Mitchell, and I will add Rosia W. Welch.

Q. 32. Did you receive any compensation for those services?

A. My compensation was general; for general services.

Q. 33. What was the compensation?

A. In the neighborhood of $900 a year.

Q. 34. Who paid you that compensation?

A. A. H. Herr.

Q. 35. How long did he continue to pay you that compensation; between what times?

A. I think from the re-issuance of the Wheeler and Reynolds' patents, up to the date of hearing in the supreme court of the District of Columbia.

Q. 36. Give me the date of the re-issuance?

A. I cannot give it from memory.

Q. 37. Under what circumstances did your compensation cease at that time?

A. On account of my inability to get along with Mr. Herr; our natures were not congenial.

Q. 38. What are your professional relations or connections with A. L. Merriman?

A. Since June, 1876, only in matters before the courts, and then under special arrangements.

Q. 39. What is the nature of your connection in matters before the courts, and under special arrangement?

A. I generally give him a portion of a fee to associate himself with me.

Q. 40. Is it a sort of partnership?

A. Well hardly, because there is not an equal division; there is no partnership agreement existing between us.

Q. 41. Then, it is in the nature of a partnership without an equal division of profits?

A. It is.

(Upon the testimony being read to the witness from the stenographic notes, he states that this answer should be "It is not.")

Q. 42. Did you consult with A. L. Merriman, in reference to the case, before and after you were admitted to practice?

A. What case do you allude to?

Q. 43. To the suit of Cochrane *et al. vs.* Deener *et al.?*

A. I may have, incidentally.

Q. 44. Did you consult with him in reference to the preparation of the argument in that case for the Supreme Court of the United States?

A. Do you mean his argument submitted under that stipulation?

Q. 45. Under what stipulation do you refer to in that query?

A. The one in the case—to submit the case on printed brief.

Q. 46. Just answer the question propounded to you as fully as you can; whether you consulted with him in reference to any arguments made by him in the Supreme Court of the United States?

A. I never consulted with him in reference to any arguments made by him in the Supreme Court of the United States.

Q. 47. Did you consult with him at all in reference to the case after the decision in the supreme court of the District of Columbia?

A. Oh, I think we talked of it sometimes.

Q. 48. Have you any knowledge of any papers or agree-

ments or writings whatsoever, referring to any settlement or adjustment of any kind, between the parties to that suit, or between any of the parties and A. H. Herr?

A. I have not.

Q. 49. Have you any knowledge of any oral agreements or understandings which induced the adjustment of that suit—I mean of the manner in which it was adjusted?

A. It often came to my ears that Mr. Herr had stated that it would be cheaper to give the complainants a judgment than to fight it.

(Mr. Mason objects to the question and answer on the ground that it is mere hearsay, with which the complainants in that case have no connection, and by which they cannot, by any rule of law, be charged.)

Q. 50. How did it come to your ears?

A. Through some of the other co-owners?

By Mr. Mason:

Q. 51. Define that word co-owners?

A. By co-owners, I mean the individuals owning the title to each patent.

By Mr. Harding:

Q. 52. Just name them; whom do you mean by co-owners?

A. I mean by co-owners A. H. Herr, J. S. Welch, R. W. Welch, J. H. Welch, and E. P. Welch; at that time my interest was held in trust.

Q. 53. Who furnished the funds to defend the suit of Cochrane *et al. vs.* Deener *et al.* in the court below and in the Supreme Court?

A. In the lower courts A. H. Herr, I believe.

Q. 54. How is it in the appellate court?

A. I can not say positively who did in that case.

Q. 55. Does Mr. Herr still hold your interest in that patent, in trust?

A. He does, as far as I know.

Q. 56. Which co-owner made the statement to which you refer?

A. I think Rosia W. Welch.

Q. 57. Any others?

A. I think there were others, but I cannot say positively at this time.

Q. 58. Did H. A. Herr make the statement to you?

A. H. A. Herr never made such a statement; I know of no H. A. Herr.

Q. 59. Did A. H. Herr ever make the statement to you?

A. He did not.

Q. 60. If you were a co-owner interested in the patents to which you have referred as being set up by the defendants in the suit of Cochrane *et al. vs.* Deener *et al.*, and that interest induced you to attend to the taking of testimony, will you explain to me why, still being the equitable owner of an interest in those patents, you did not ascertain the circumstances under which the adjustment of that suit was made in the Supreme Court of the United States?

A. Because, after my interest was transferred by me to Mr. Herr in trust, he spoke of dismissing the suits brought under those patents—the patents mentioned in the beginning of my examination—on the ground that it was costing him a great deal of money. I then came to the conclusion to pay more attention to my weekly stipend for services in the case than to look for any income from the patents.

Q. 61. How long after this conversation with Mr. Herr did your weekly stipend continue?

A. Which conversation?

Q. 62. The one referred to in your last answer.

A. He did not speak to me; I didn't say "to me," because he and I had nothing to say to one another.

Q. 63. How long after he spoke did you continue to receive your weekly stipend?

A. From one to two months, I think; possibly more.

Q. 64. Why did the fact that he spoke of discontinuing the suits under the patents induce you to determine to depend on your weekly stipend thereafter?

A. Because, as I answered before, I attached more value to my weekly stipend than I did to my interest in the patents.

Q. 65. How did Mr. Herr's speaking of discontinuing

those suits cause this effect upon your mind as to the value of those patents as a dependence?

A. Because he had the means under his management to carry those suits to an end, and the other co-owners were unable or unwilling.

Q. 66. Why do you think they were unable or unwilling?

A. Because they stated so.

Q. 67. Which did they state—that they were unable, or unwilling?

A. I cannot state positively.

Q. 68. What made you use the expression "unwilling?"

A. I suppose by inference, at the time.

Q. 69. How long after Mr. Herr ceased to speak to you, or to have intercourse with you, did he continue to pay you the stipend?

A. I think it ceased at that time.

Q. 70. I understood you to say that it was two months after he spoke of discontinuing the suits that he discontinued the stipend, and that you were not on speaking terms, yourself, with him at the time he spoke of discontinuing the suits; is that so?

A. I think I stated that the relationship between us was not congenial, and that we merely spoke at that time. I do not think, however, we have spoken since the day of the hearing in the supreme court of the District of Columbia. He has spoken to me, but I have not to him.

Q. 71. Was it before or after the hearing of the suit in the supreme court of the District of Columbia that the stipend was discontinued?

A. It was after the day of hearing.

Q. 72. Was it before or after the decision in the supreme court of the District of Columbia?

A. Before the decision, I think.

Q. 73. Was it before or after that date that he spoke of discontinuing the suits?

A. It was before that date.

Q. 74. Was it before or after the day of hearing the case in the supreme court of the District of Columbia that he spoke?

A. It was before the day of hearing.

Q. 75. If, then, you and he continued on speaking terms down to the day of hearing, will you explain to me why you did not ask him or learn from him why the suits on the patents in which you were an equitable co-owner were discontinued?

A. I suppose because I did not attach sufficient importance to them, for one reason; another reason was that I did not care to converse with him, knowing that he never liked me.

Q. 76. Why did you not attach sufficient importance to them?

A. Because I thought that he had lost interest in it, and I did not think we would find anybody else to advance the money to carry them on.

Q. 77. What was the amount of your interest in these patents, and what was the consideration for the deed of trust made to Mr. Herr?

A. I think my interest was one-eighth in each. The consideration for the trust, if I remember right, was $250.

Q. 78. Is the assignment of those patents by you to Mr. Herr of record?

A. It is; that is, the Wheeler and Reynolds' patent. I think the last named, however, was a mesne assignment.

Q. 79. What do you mean by that?

A. The assignment was recorded prior to the issuance, and it issued to the assignees; however, I am not positive as to that.

Q. 80. Did you not consider your right of redemption in those patents sufficient to induce you to inquire of the parties as to the disposition of the suit in the Supreme Court of the United States?

A. It was my intention to inquire, but I have never carried it out.

Q. 81. Was your assignment of the patents in which you were interested, and which are set up in the defendant's answer in the case of Cochrane *et al.* vs. Deener *et al.*, made before or after the hearing in the case of Cochrane *et al.* vs. Deener *et al.* in the supreme court of the District of Columbia?

A. Before; either in January or February, 1875.

Q. 82. Is that the date of the trust-deed to which you refer?

A. It is not.

Q. 83. What did you assign in February, 1875, and what was the consideration?

A. I assigned the patents of Jesse B. Wheeler and Ransom S. Reynolds, and I acquired a one-eighth interest; the consideration being services, time, and trouble in purchasing them.

Q. 84. What did you pay for them, and what did you receive?

A. I cannot remember just now.

Q. 85. Give me you best recollection?

A. I would have to refer to the receipts that I handed Mr. Herr.

(Upon the testimony being read to the witness from the stenographic notes, he states that he wishes to add to this answer: I gave $2,000, I think, for them, and received for them when I assigned them a one-eighth interest in each; Mr. Herr's money purchased them.)

Q. 86. Was it $1,000?

A. I think more than $1,000.

Q. 87. Was it $2,000?

A. I think it was nearly $2,000.

Q. 88. How much did you give for those patents which you assigned?

A. I cannot remember positively; I would have to see the papers in the case.

Q. 89. Did you give $1,000?

A. I cannot say positively.

Q. 90. Do you think you gave $500?

A. I cannot say.

Q. 91. Do you think you gave as much as $100?

A. I know I gave as much as $100.

Q. 92. Do you think you gave $200?

A. Yes; I think I gave $200.

Q. 93. Would you like to swear that you gave $200?

A. For both of them?

Q. 94. Yes.

A. Yes; I can say that.

Q. 95. Would you like to say you gave $300?

A. Yes; I would be positive up to $500.

(Upon the testimony being read to the witness from the stenographic notes, the witness states that the answers

to interrogatories numbered 88, 89, 90, 91, 92, 93, 94, and 95 were made under a misapprehension.)

Q. 96. Did you execute a deed of trust for the patents set up in the defendant's answer before or after the hearing of the case in the supreme court of the District of Columbia?

A. Before the hearing. I think I have answered that before.

Q. 97. How long before the hearing?

A. Some months. I cannot remember how many.

Q. 98. Do you know where Mr. A. L. Merriman is at present?

A. I do.

Q. 99. Where is he?

A. Having had an intimation that we had taken a little trip to evade this service, I immediately notified him, at Norwich, Connecticut, from New York, to return to Washington. I left New York yesterday, within an hour and a half after I heard that I was wanted.

Q. 100. Where do you think Mr. Merriman is now?

A. He is in Norwich, Connecticut, and at this time, I think, making an argument before the superior court in that city.

Q. 101. Do you know when he will be here?

A. I think he will be here Thursday morning.

Q. 102. What made you say that you had an intimation of the kind stated by you?

A. Because I had one.

Q. 103. From whom?

A. From a friend of mine.

Q. 104. Are you willing to state his name?

A. I am.

Q. 105. Were you subpœnaed?

A. I visited Mr. Nicolay, the marshal of the Supreme Court, this morning, and told him that I was James A. Maloney. He said he was very glad to see me.

Q. 106. Had you any knowledge of an attempt to subpœna you before you visited the marshal and told him who you were?

A. I left New York purposely to answer the subpœna that I heard had been issued for me.

Q. 107. Did you hear that a subpœna had been sent to your residence?

A. No, sir.

Q. 108. Or your office?

A. I heard that this morning, on my arrival at home, about 7 o'clock.

Cross-examination.

By Mr. MASON:

Cross-Q. 109. You stated that your connection with Mr. Merriman was a partnership, with an unequal distribution of the proceeds of the partnership; do I understand you to say that the arrangement between you and Mr. Merriman, of which you were then speaking, constituted you and him in any sense what are generally known as general partners in business?

A. No, sir; not by any means.

Cross-Q. 110. I understood you to say that you were only in the habit of employing one another to such an extent and upon such special terms as in each case, in which either of you might be employed, you should agree upon?

A. And that only in cases before the courts. Our general partnership was dissolved more than a year ago; I think we dissolved in June, 1876.

Re-direct examination.

By Mr. HARDING:

Q. 111. You still occupy communicating offices, do you not?

A. We do.

Q. 112. The entrance to Mr. Merriman's office is principally through your own, is it not?

A. Principally; yes, sir.

Q. 113. Is there a firm of A. L. Merriman & Co. in existence now?

A. I do not know of any such firm.

Q. 114. Is there a firm of Merriman & Maloney used on the bill-heads, letter-heads, or otherwise?

A. Not since our dissolution; I have never used them. The old signs, however, of "A. L. Merriman & Co." are still on the door and bulletin board.

Q. 115. What change took place in the nature of your relations in June, 1876?

A. I only received one-fourth, I think, of the profits from the judge. I divided with him half and half; consequently I thought there was too much *meum* and not enough *tuum* on his part.

Q. 116. How was it after June, 1876?

A. I gave him something out of each case, where I had him in a case with me. I think, in one instance, I divided equally with him in a retaining fee; only in one instance.

Q. 117. Were you present at any time when the terms of settlement or adjustment between any of the parties to this case in the Supreme Court of the United States were discussed?

A. I do not think I ever was.

Q. 118. Do you feel willing to swear that you were not?

A. If I was I have no recollection of it now.

Q. 119. Do you feel sufficiently assured that you were not present at such a conference to enable you to swear on the subject?

A. I say I have no recollection—not the slightest.

Q. 120. Do you not think that if you were at such a conference you would have recollected it with sufficient distinctness to be able to swear positively one way or the other?

A. I think I would.

Q. 121. Then, so far as your recollection goes, you are willing to swear that you never were present when such a subject was discussed between any of the parties to that suit?

A. I am willing to swear that my memory does not serve me at this time that I was there. My memory does not serve me that I was ever present at any settlement alluded to in the question.

Q. 122. Are you willing to swear that, according to your best recollection, you were not present at any conversation between the parties to this suit, or any of them, or at which Mr. Herr was present, or any one representing any of the parties to this suit, in which the subject of the settlement of the case was discussed?

A. After the transfer of my interest to Mr. Herr, I never attended any of the meetings held by the co-owners; and

therefore, the assignee has made that election, if he receives or demands the price, it is equivalent to an express declaration that he does not impeach the sale, and has no claim to the goods. But if he takes possession of the goods or demands them of the purchaser, on the ground that the sale was void as to creditors, it is equivalent to a renunciation of all claim for the price.

"We are then brought to the question, What act on the part of the assignee is to be taken as proof of his election? It would, we think, be going too far to say, that merely demand of the price should be deemed a waiver of his right to avoid the sale, and claim the goods; because, in many cases, if the price could be obtained it would be equally beneficial to the creditors, and he would have no further occasion to pursue the harsher remedy of impeaching the sale. But we think that if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but, by necessary implication, affirms it. It is an act too deeply affecting the rights of the purchaser, whilst it is an assertion of his own; and if done with a knowledge of all the facts, which ought to influence him in his election, it is conclusive."

It will be observed that this case is exactly the reverse of the case at bar. Here the defendants in error, the assignees, deliberately disaffirmed the sale, avoided it, and brought suit for all the goods, and recovered judgment for such amount as they chose to agree. (*See Record, p. 13*).

A fortiori will the doctrine of election apply to them. Is not their procedure an election to set aside the sale? How, then, can they sue for the notes given in consideration of the sale? Can they hold both the property and the consideration paid for it? This is settled by a very ancient and undisputed authority: "One cannot have his cake and eat it too."

In addition, the assignees then proceeded to sue and

recover by compromise the remainder of the money which was the consideration of the sale. This, indeed, is sought to be avoided by the Court below, as explained in the defendant's brief, page 4, by saying, "It was immaterial what amount had been recovered of Goodnow, except so far as under the instructions of the Court the jury were justified in regarding them for the purpose of determining whether the settlement with Goodnow covered compensation for all the property."

But how could this be? Goodnow and Sessions took together the whole consideration for the property. *In two actions the assignees had recovered all the property*, or its equivalent, of Goodnow.

If there could be contribution between joint tort-feasors, and it is difficult to see how there was any such wrong done as between Goodnow and Sessions as would prevent contribution in this case, Goodnow clearly would have his action against Sessions for such contribution, who is liable to that claim still.

The case seems to have been determined in the Court below, and also is argued here, upon the ground that the recovery against Goodnow is not a technical bar to a recovery against Sessions. That this was a mere election of remedies as if an election *de melioribus damnis*, and not an *Election of Right* by the assignee in affirmance or disaffirmance of the sale. (*See Hildreth* vs. *Butler*, *ubi supra.*)

Be it so, *causa argumenti*, but that is not the principle upon which the action of the assignees in suing and obtaining judgment and recovery against Goodnow should stand. It ought to have been held that the assignees, having made their election to recover the whole value of the property from Goodnow by two actions, one of which was a disaffirmance of the sale of the property, and in both of which they got its whole value, they are estopped by their acts, *in*

pais, from proceedings against Sessions for the consideration of the sale, which they have elected to avoid.

What we set up is not a bar by judgment, but estoppel, by having sued for and recovered the entire property in disaffirmance of sale, now to recover the consideration of the same sale, or any part thereof.

The defendants in error cannot be permitted to disaffirm one-half of the same sale made to Nichols and Johnson, as against Goodnow, and affirm the other half as against Sessions, especially after they have recovered the full value of the whole property upon the disaffirmance of sale, all the property that the bankrupts had, as against Goodnow.

For the case finds that there was included in the Goodnow mortgage other property of the bankrupts beyond that which was held by the mortgage of Sessions, and therefore it was that the amount of the purchase money was divided in the proportions we have seen, of $2,444.40 and $3,556.60.

As to the fourth assignment of error, —

Having recovered $4,000 out of $6,000, being the value of the whole property against Goodnow, with interest and costs, how can Sessions, the plaintiff in error, be held for any more than the value of the whole property, deducting what had already been received by the assignees? This instruction is expressly refused by the Court below. (*Record, p. 9.*)

Goodnow and Sessions had interfered with the bankrupt's property, worth say, $6,000. From one, $4,000 had been recovered. Waiving the question whether the other can be sued and the act divided, how can there be recovery against the other of more than the remainder of the value of the property not already received by the assignees?

Upon the last assignment of error, that an immaterial issue

was put to the jury, we submit that it being admitted that the mortgage assigned to Sessions was a valid one given by the bankrupts to W. W. Sprague, to secure him for liability as their future endorser, and that Sessions had only received the value of the property secured by such mortgage on its release, instead of the mortgage itself, that in a suit brought for the property which was substituted instead of the mortgage, without fraud, to wit, these notes, it is entirely immaterial whether W. W. Sprague had paid his endorsements or not. The only question should have been, Is he liable for those endorsements, and to what extent?

The difference between that liability and the value of the property, deducting therefrom the amount already received by the assignees, was the extent of the possible liability of Sessions.

Again, Sessions held a lien upon certain property in his hands to secure endorsements of W. W. Sprague, which the record shows was but in part paid. (*See Record, page 7. See brief of defendants in error, p. 2, par. 3.*)

On whom was the burden of proof as to the amount of that lien? The lien is admitted to be valid for some amount. (*See Record and brief before cited.*) The assignees seek to recover the property discharged from that lien. As long as a single dollar remains of that lien does not the lien for that dollar attach to every portion of the property, to wit, the notes of hand held by Sessions, and is not the burden upon the assignees who seek to recover the property discharged of the lien to show that the lien is discharged, or how far discharged, and not on the holder.

Upon the whole, then, we have this case: A man holding a valid mortgage to secure endorsements, discharging that mortgage upon substitution of other security therefor, to wit, notes of hand, is sued by the assignees of a bankrupt for the property so held by him as security; after they have

received from the party concerned with him in the same transaction the entire value of all the property upon a disaffirmance of the sale, they call upon him to surrender his property, admittedly held for a valid lien, and the Court instruct the jury that he must show that that lien is not discharged.

The Justice of It.

By these proceedings the Supreme Court are asked to give judgment in favor of assignees of a bankrupt for one-third more than it is admitted certain property sold was worth, against one party, they having just recovered the full value of the whole against the other party to the same transaction.

Without considering the rights of the defendant, upon what principle of law or equity are the assignees entitled to do this? Will the Court bend and twist technical rules of law to work out such a result?

Which is respectfully submitted.

BENJ. F. BUTLER,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1876.

SESSIONS, PLAINTIFF IN ERROR,
vs.
JOHNSON ET ALS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

THIS is a suit at law by the assignees of Kane, Sprague & Company, bankrupts, against the plaintiff in error, to recover the value of three promissory notes, signed by Nichols and Johnson, and two promissory notes signed by Henry W. Snow, amounting together to $2,444.40, which notes were given to the plaintiff in error under the circumstances hereinafter stated.

In fact, these notes being in one sense the property of the bankrupts, were delivered to Sessions within six months before the commencement of bankruptcy proceedings; and it alleged that this was done to prevent the property coming to the assignees in bankruptcy.

At the trial before the District Court, exceptions were taken in point of law to the several rulings and directions

of the presiding judge, and also to his refusal to give certain instructions prayed for, as set forth in the Record, pp. 6–9, and are now brought before this Court for revision.

The Facts in the Case as Agreed.

April 5th, 1870, the bankrupts made a mortgage upon their stock and implements of trade to W. W. Sprague, to secure him as endorser for future endorsements of the bankrupt's paper.

On the 13th of said April, W. W. Sprague, the mortgagee, assigned this mortgage to the plaintiff in error to secure a debt due from said Sprague to the plaintiff in error.

The good faith and validity of this mortgage was not in dispute, being made more than six months before the bankruptcy proceedings, which were begun November 2, 1870. (*See defendant's brief, page 3, paragraph 1.*)

October 4th, 1870, bankrupts made a second mortgage of said property and *additional property* to one Goodnow, for $4,000, which Goodnow paid to W. W. Sprague, and it was used by him *in part payment* of certain notes given by the bankrupts, upon which Sprague and Goodnow were endorsers. (*See defendant's brief, p. 2, paragraph 3.*)

October 12, 1870, the bankrupts sold *all their property* thus mortgaged to Nichols and Johnson, and received in payment therefor their notes and those of one Henry W. Snow, the whole consideration of the sale being $6,000. Of these notes $2,444.40 were delivered to Sessions, and $3,556.60 to Goodnow, in discharge of their mortgages, which they released to Nichols and Johnson.

The sale to Nichols and Johnson, the receipt of the notes and the release of the several mortgages, substituting the notes for the mortgage security, were all parts of *one and the same transaction.* (*See defendant's brief, p. 2, par. 4.*)

The assignees have sued Goodnow in trover for the entire

value of the property covered by the mortgage. The assignees in this manner *elected to disaffirm and avoid* the sale by their bankrupts to Nichols and Johnson, and the mortgage made by the bankrupts to Goodnow, and claimed to recover the property sold to Nichols and Johnson, and mortgaged to Goodnow, as if the sale had not been made, alleging it to be in fraud of the bankrupt law.

Upon this suit judgment was given for the plaintiffs in the sum of $4,000, with interest and costs, which judgment was satisfied by Goodnow. (*See defendant's brief, p. 2, par. 6.*)

The assignees then brought another suit at law against Goodnow for the money received by him on the notes of Nichols, Johnson and Snow, given him in discharge of his mortgage, which suit was afterwards settled by agreement of parties, and *full release of Goodnow given* upon the payment of $2,000. (*See opinion of Circuit Judge, defendant's brief, p. 5, at bottom of page.*)

The assignees had thus recovered from Goodnow $6,000, *being the entire proceeds of the sale of all the property of the bankrupts, and its agreed value,* $6,000.

The assignees then bring this suit against Sessions to recover the notes given by Nichols and Johnson as consideration for the purchase of the property at the very sale which the assignees had avoided and disaffirmed in the suit against Goodnow; thus affirming the sale, and attempting to recover the notes given in payment for the property, which they had just before disaffirmed and avoided, and recovered from Goodnow to the full value of the property, and for which they had given him a receipt in full.

CAN THIS BE DONE?

The assignees now, by the suit at bar against plaintiff in error, seek to recover nearly $3,000 more than the whole goods were worth, having already received the full value of them.

Upon what principle are the assignees entitled to receive this large sum of money beyond the entire value of the property of the bankrupts, being the consideration paid on a sale which they had disaffirmed, and received back the entire value of the property sold?

Can they now affirm that sale so disaffirmed as against Goodnow, the other party to the same transaction with the plaintiff in error, and recover a part of the consideration paid on a contract of sale which they had avoided and disaffirmed, and received the entire property back, or its equivalent?

The plaintiff in error therefore assigns errors in the record and proceedings of the District Court in these: —

I.

That the Court below ought to have instructed the jury that this action is not maintainable, because the assignees had already disaffirmed the sale of the goods by the bankrupts, and received the value of the property attempted to be sold, and specially if they had taken judgment and received satisfaction for the value thereof, with full knowledge of all the facts regarding the invalidity of the sale.

II.

The Court below ought to have instructed the jury that the assignees were estopped by their previous proceeding in

disaffirmance and avoidance of the sale, and receiving the entire proceeds thereof, from maintaining this suit.

III.

That if they could affirm and proceed for the consideration, they could only recover of the plaintiff in error the value of the goods after deducting therefrom the amount already received. They could not have a double recovery for the same goods.

IV.

Assuming the action could be maintained at all, the jury should have been instructed that if the jury found the mortgage assigned to Sessions was valid and given to secure a contingent liability for the bankrupts, the assignees could not recover the proceeds of the mortgaged property then in the hands of Sessions, so long as any liability remained which the mortgage was given to secure.

V.

That the case was submitted to the jury upon an *immaterial issue:* to wit, that it was incumbent on Sessions to show that the bankrupts were indebted to W. W. Sprague for moneys *advanced* to take up the paper which he had endorsed for them. And that the burden of proof was upon Sessions to show this to the satisfaction of the jury.

Upon this point the issue should have been, Was there any liability now outstanding and undischarged by endorsements made by Sprague of the bankrupts' paper to secure which the mortgage was given? The mortgage would be as valid to

secure against that liability as if the advance had actually been made.

This position as to the validity of the mortgage, because of the liability of W. W. Sprague, as endorser for the bankrupt, was conceded by the Circuit Judge. *(See opinion, p. 6, brief of defendant, paragraph 2.)* He says the Court below find "this position of the plaintiff in error is well taken; but the bill of exceptions does not show that any instructions were given by the presiding judge contrary to this view of the law.

It is respectfully submitted that the exceptions do show that the presiding judge put the case to the jury with instructions that the burden of proof was upon the plaintiffs in error to show that W. W. Sprague had advanced the money to take up paper which he had endorsed for the bankrupts, and failing to support this burden, the verdict was against him. The question to the jury should have been, Is there any outstanding liability of Sprague, as before stated?

Argument.

Upon the first three assignments of error, that the assignees having elected their remedy in case of a sale by the bankrupt of property, which sale may be avoided by creditors, they cannot then take another remedy, but are bound by their election. The plaintiff in error submits that the case of

Butler, Assignee, *vs.* Hildreth, 5 Metcalf (Mass.) R., p. 49,

is precisely in point.

It will be observed that this is a case decided in the same State, and therefore is the *lex fori*.

The provision as to avoiding sales of property, for the purposes of preference in the present bankrupt law, is copied almost *verbatim* from the insolvent law of Massachu-

setts, under which the decision of *Butler* vs. *Hildreth* was made.

This case decides that where a sale has been made by an insolvent for the purpose of hindering and delaying his creditors, and therefore void as against the assignee, the assignee may elect to pursue either of two remedies: —

First, To avoid the sale, as he has a right to do under the law; or,

Second, To sue for the consideration money or notes, if he deems that to so do is most advantageous for the interests of the creditors.

In this case a sale was made by an insolvent to hinder his creditors. He took the notes of the purchaser in payment. The assignee brought suit upon the consideration notes paid for this property; but before the entry of the suit he gave notice of a discontinuance of the same, and afterwards brought trover for the property sold, and produced the notes in Court to be returned to the purchaser to be cancelled if the sale was held invalid.

The Court decided, in an elaborate opinion of Ch. J. Shaw, that if the assignee knew of the facts as to the validity of the sale at the time he brought the suit upon the notes given as consideration, and no more facts tending to show its validity had come to his knowledge at the time he brought the second suit to disaffirm the sale and recover the property, the first suit was in law an affirmance of the sale; and, although discontinued, the assignee could not be permitted after having made his *election*, by the act of bringing the suit, to disaffirm the sale, which he had already ratified, and sue for the proceeds.

The language of the Court is as follows: —

"Upon this case the jury were instructed that if the plaintiff, at the time he sued the notes, knew all the facts — as he did afterwards, when he commenced this action of trover — tending to show that the sale was fraudulent and void,

it was to be considered in law as a ratification of the sale, and that in such case this action could not be maintained. The cause went to the jury under this instruction, and they returned a verdict for the defendant.

"In order to test the correctness of this direction, it was necessary to consider what the rights of the plaintiff were, when he thus became the assignee of these insolvent debtors. We assume, for the purpose of this inquiry, that he had the right, in behalf of creditors, to set aside this conveyance, if in fact it was made to defraud creditors. But such a conveyance is not *ipso facto* void; it is valid as between the parties; it is binding upon the purchaser, and he could not avoid the payment of his notes on that account. It can be avoided only by the creditors, or one representing creditors. But circumstances may be such that it may not be for his interest to avoid such sale, but on the contrary to affirm it. Suppose the fraudulent character of the transaction consisted in this, that the debtor intended to sell his goods and the purchaser to buy them for the express purpose of preventing an immediate attachment, by substituting for goods open to attachment promissory notes not capable of attachment. Should these notes afterwards come into the hands of an assignee it might be more beneficial for the creditors to collect the notes, which would affirm the sale, than to disaffirm the sale and repudiate the notes. The assignee has an *election*, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other. This results from the plain and very obvious consideration, that the assignee cannot affirm the sale in part; if it is to stand as a valid sale, the property of the goods remains vested in the purchaser, and he remains liable for the price. But if the sale is avoided and set aside, it stands as if it had never been made; the property may be taken possession of by the representative of the creditors, as if no sale had been made, and the purchaser ceases to be liable for the price; when,

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OCTOBER TERM, 1876.

SESSIONS, PLAINTIFF IN ERROR,

versus

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Brief for Plaintiff in Error.

STATEMENT OF FACTS.

BENJ. F. BUTLER,

OF COUNSEL FOR PLAINTIFF IN ERROR.

BOSTON:
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